

# Chapter 1—Parties

## § 1.01 Introduction

In order to determine what claims a client may assert in litigation, the plaintiff's lawyer must first consult the relevant substantive law to identify the causes of action available to the client. With the client's potential claims in mind, the lawyer must decide which individuals and legal entities to include as plaintiffs and defendants in the lawsuit. The decisions whom to include as plaintiffs and whom to name as defendants control two important issues affecting the early planning of the litigation: (1) Do the California courts have the legal authority to render a judgment binding on the chosen defendants? (2) In which county should the plaintiffs lay venue for their action?

The decision whom to include as parties in a lawsuit has important tactical implications. Joining multiple plaintiffs may spread the cost of litigation over multiple pocket books. Aggregating the claims of multiple plaintiffs may permit the plaintiffs to present a more formidable threat to the defendant and to satisfy the jurisdictional requirements of the superior court. By joining as a plaintiff, however, a party submits himself to the personal jurisdiction of the court with respect to any cross-claim the defendant may wish to assert. The inclusion of multiple plaintiffs may complicate the case to the point of confusing the jury. Weak facts relating to one plaintiff's claim may diminish the impact of strong facts relating to another plaintiff's claim. The plaintiffs' lawyer faces more difficult problems of case management when representing multiple parties, and if each plaintiff has his own

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## § 1.02 Persons Who May Be Joined as Parties

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lawyer, the problems multiply. Finally, settlement becomes more complicated when more parties are involved.

In an action for damages, the plaintiff naturally wishes to include as a defendant a party who has sufficient nonexempt assets or insurance to satisfy the plaintiff's anticipated judgment. The more defendants, the more pockets. By joining an additional defendant who is a citizen of the same state as the plaintiff, the plaintiff can destroy diversity of citizenship and prevent the defendants from removing the case to federal court on that basis. One lawsuit is cheaper than multiple lawsuits. Inclusion of multiple defendants may expand the plaintiff's [venue](#) choices and avoid the defense that fault for the plaintiff's loss lies with someone not joined in the lawsuit. Multiple defendants may turn against each other, assisting the plaintiff's case. Joining an additional defendant, however, has the undesirable effect of adding an additional lawyer to the defense team and increasing both the resources potentially available to the defense of the case and the potential for jury confusion.

➔ [Removal Jurisdiction](#)

In order to make these tactical decisions, the parties must know who *may* be joined as parties in the lawsuit, who *may not* be joined as parties in the lawsuit, and who *must* be joined as parties in the lawsuit.

### § 1.02 Persons Who May Be Joined as Parties

#### [A] Permissive Joinder of Plaintiffs

##### [1] Same Transaction or Occurrence

Code of Civil Procedure section 378(a)(1) provides that several plaintiffs may join in the same action if they “assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these

persons will arise in the action.”<sup>1</sup> Joinder under this provision thus depends on whether the plaintiffs’ claims present common questions of law or fact.<sup>2</sup> The provision covers transactions in the traditional sense of the word, including contracts and property transactions.<sup>3</sup> It also includes occurrences giving rise to tort claims, including “[w]hatever may be done by one person which affects another’s rights, and out of which a cause of action may arise.”<sup>4</sup>

**Example:**  $P_1$  and  $P_2$ , two chiropractors, sue a newspaper publisher and several investigators of the Department of Public Health and Board of Medical Examiners. The plaintiffs allege that the defendants conspired to destroy the plaintiffs’ practices by searching their offices and seizing their property. Each pleads causes of action for trespass and conversion. The trial court sustains the defendants’ demurrers for misjoinder of parties.

The trial court ruled correctly. The facts relating to the trespass and conversion of  $P_1$ ’s property had nothing in common with the facts relating to the trespass and conversion of  $P_2$ ’s property.<sup>5</sup>

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<sup>1</sup> See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:208–:229 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 175–177 (4th ed. 1997).

<sup>2</sup> *People’s Fed. Sav. & Loan Ass’n v. State Franchise Tax Bd.*, 110 Cal. App. 2d 696, 699, 243 P.2d 902, 904 (1952).

<sup>3</sup> *Garrison v. Hogan*, 112 Cal. App. 525, 531–32, 297 P. 87, 90 (1931).

<sup>4</sup> *Colla v. Carmichael U-Drive Autos, Inc.*, 111 Cal. App. Supp. 784, 786, 294 P. 378, 379 (1930).

<sup>5</sup> *Coleman v. Twin Coast Newspaper, Inc.*, 175 Cal. App. 2d 650, 654, 346 P.2d 488, 490–91 (1959).

**Example:** Employees of *D Corp.* and their families sue *D Corp.* and others for exposing the employees, and through them their families, to a toxic chemical. The trial court sustains the defendants' demurrers for misjoinder of parties.

The trial court erred. All of the plaintiffs' injuries flowed from the same series of exposures at the same location. Thus, the plaintiffs' claims presented numerous common questions of law and fact.<sup>6</sup>

Each plaintiff need not be interested as to every cause of action or as to all the relief prayed for. The court may give judgment for one or more of the plaintiffs according to their respective rights to relief.<sup>7</sup>

### [2] Common Interest in Subject Matter

A set of plaintiffs may join in the same action if they "have a claim, right, or interest adverse to the defendant in the property or controversy which is the subject of the action."<sup>8</sup>

**Example:** *P Corp.*, an insolvent corporation, and *R, P Corp.*'s receiver, join in an action to recover usurious interest. The trial court overrules a demurrer for misjoinder of parties.

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<sup>6</sup> *Anaya v. Superior Court*, 160 Cal. App. 3d 228, 233, 206 Cal. Rptr. 520, 523 (1984); *accord*, *State Farm Fire & Casualty Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1113–14, 53 Cal. Rptr. 2d 229, 241 (1996).

<sup>7</sup> CODE CIV. PROC. § 378(b).

<sup>8</sup> CODE CIV. PROC. § 378(a)(2). *See generally* 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 178 (4th ed. 1997).

The trial court ruled correctly. The corporation and its receiver were both interested in the subject matter of the action.<sup>9</sup>

**[B] Permissive Joinder of Defendants**

The rules on the joinder of defendants are the mirror image of the rules applicable to plaintiffs. In order to include a defendant in a lawsuit, the plaintiff must seek, and the substantive law must provide, a legal remedy against the defendant.<sup>10</sup> One cannot join as a defendant someone against whom one seeks no relief, even if that person would benefit from another's defendant's victory.<sup>11</sup>

A plaintiff may join a group of defendants in the same action if he asserts against them "[a]ny right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all [the defendants] will arise in the action."<sup>12</sup> Each defendant need not have an interest as to every cause of action or as to all the relief prayed for; the court may give judgment against one or more defendants according to their respective liabilities.<sup>13</sup> As applied to tortfeasors, this provision has been interpreted as including concurrent tortfeasors (those whose wrongful acts simultaneously cause the plaintiff's injury)<sup>14</sup> and successive

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<sup>9</sup> North v. Cecil B. De Mille Prods., 2 Cal. 2d 55, 58, 39 P.2d 199, 200 (1934).

<sup>10</sup> Weisman v. Odell, 3 Cal. App. 3d 494, 498, 83 Cal. Rptr. 563, 566 (1970). See generally 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 179–184, 191 (4th ed. 1997).

<sup>11</sup> Pinnacle Holdings, Inc. v. Simon, 31 Cal. App. 4th 1430, 1437, 37 Cal. Rptr. 2d 778, 782 (1995).

<sup>12</sup> CODE CIV. PROC. § 379(a)(1).

<sup>13</sup> CODE CIV. PROC. § 379(b).

<sup>14</sup> Shea v. City of San Bernardino, 7 Cal. 2d 688, 693–94, 62 P.2d 365, 367 (1936).

tortfeasors (those whose wrongful acts successively cause the plaintiff's injury).<sup>15</sup> The plaintiff, however, retains the right to segregate his claims against successive tortfeasors into separate actions.

**Example:** *X* is injured in a car accident and dies after treatment in *Hospital*. *Heirs* file a wrongful death case against *Hospital* for malpractice and settle the case. Then they sue *Driver*, who is responsible for the accident. The trial court sustains *Driver*'s demurrer on the ground that the wrongful death statute<sup>16</sup> creates a single cause, which was extinguished by the dismissal of the case against *Hospital*.

The trial court erred. *Heirs* had separate wrongful death causes of action against *Driver* and *Hospital*, and although *Heirs* could have joined *Driver* and *Hospital* in a single action, *Heirs* retained the right to sue the defendants in separate actions (with *Driver* receiving credit for the payment the heirs received from *Hospital*).<sup>17</sup>

A plaintiff may not join the issuer of a liability insurance policy as a defendant in an action against the insured.<sup>18</sup>

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<sup>15</sup> Kraft v. Smith, 24 Cal. 2d 124, 130, 148 P.2d 23, 26 (1944).

<sup>16</sup> CODE CIV. PROC. § 377.60.

<sup>17</sup> Helling v. Lew, 28 Cal. App. 3d 434, 438–39, 104 Cal. Rptr. 789, 792–93 (1972).

<sup>18</sup> Wyene v. Durrington, 112 Cal. App. 2d 821, 822, 247 P.2d 414, 414–15 (1952). The plaintiff may, however, join the insurer as a defendant if the policy or a municipal ordinance, in compliance with which the policy was issued, provides that the policy should inure to the benefit of the public. Butler v. Sequeira, 100 Cal. App. 2d 143, 146–147, 223 P.2d 48, 51 (1950). The plaintiff may also join the insurer to resolve a collateral issue in the case against the tortfeasor. Johnson v. Threats, 140 Cal. App. 3d 287, 290–91, 189 Cal. Rptr. 447, 449 (1983).

➔ Drafting the  
Complaint—Pleading  
in the Alternative

### [C] Pleading in the Alternative

If the plaintiff has doubts as to the person from whom he is entitled to redress, he may join two or more defendants, with the intent that the trial will resolve the question as to which of the defendants is liable and to what extent.<sup>19</sup> When pleading in the alternative, the plaintiff must take care to state a cause of action against each defendant<sup>20</sup> and must plead “a specific relationship between the defendants, namely, a single or cumulative injury, giving rise to doubt as to the respective liability of defendants for that injury.”<sup>21</sup>

**Example:** *P* alleges that *D*<sub>1</sub>, claiming to be an agent for *D*<sub>2</sub>, made a contract with *P* and that *D*<sub>2</sub> denied that *D*<sub>1</sub> was acting on his behalf and repudiated the contract. *P* alleges a cause of action against *D*<sub>1</sub> for breach of his warranty of authority and, in the alternative, a cause of action against *D*<sub>2</sub> for breach of the contract.

*P* has adequately pleaded alternative causes of action against *D*<sub>1</sub> and *D*<sub>2</sub> in order to determine which of the two is liable for *P*'s losses.<sup>22</sup>

**Example:** *P* files a complaint alleging that *D*<sub>1</sub> negligently treated her. In a second count, she alleges that *D*<sub>2</sub> negligently treated her at different

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<sup>19</sup> CODE CIV. PROC. § 379(c). See generally 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 185–189 (4th ed. 1997).

<sup>20</sup> Kraft v. Smith, 24 Cal. 2d 124, 131–32, 148 P.2d 23, 27 (1944).

<sup>21</sup> Landau v. Salam, 4 Cal. 3d 901, 907, 484 P.2d 1390, 1395, 95 Cal. Rptr. 46, 51 (1971).

<sup>22</sup> Cf. Bussett v. California Builders Co., 123 Cal. App. 657, 667, 12 P.2d 36, 40 (1932) (dictum).

times and places. *P* further alleges that she is unable to determine whether one or the other or both caused her injuries.

*P* adequately pled alternative causes of action. Pleading in the alternative was proper based on *P*'s allegation that the injury for which she sought recovery was proximately caused by *D*<sub>1</sub> or *D*<sub>2</sub> or both of them and that “a reasonable uncertainty, requiring determination of some factual or legal issue, exists in respect to alternative or quantitative liability.”<sup>23</sup>

### § 1.03 Limitations on the Joinder of Parties

Notwithstanding the liberal rules on the joinder of parties, the plaintiff's lawyer must take account of two rules limiting the plaintiff's choice of parties—the requirements that the plaintiff prosecute the action in the name of the real party in interest and that each party have the legal capacity to sue and be sued.

#### [A] Choosing Between Plaintiffs—The Real Party in Interest Rule

It often occurs in litigation that the plaintiff's lawyer must choose between apparently interested persons in determining which to name as the plaintiff in the lawsuit. Code of Civil Procedure section 367 sets forth the general principle for choosing between potential plaintiffs in an action: “Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute.” One identifies the real party in interest by reference to the substantive law governing the cause of action.<sup>24</sup> Where the complaint states a cause of action in someone, but not in the plaintiff, a [general demurrer](#) for failure to state a cause of action will be

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<sup>23</sup> Kraft v. Smith, 24 Cal. 2d 124, 130–31, 148 P.2d 23, 26 (1944).



sustained.<sup>25</sup> The plaintiff's lawyer cannot avoid the problem simply by naming both parties as plaintiffs: if a plaintiff who is not a real party in interest is included in the complaint with a plaintiff who is a real party in interest, his inclusion is subject to challenge by way of a [special demurrer](#) for misjoinder.

### [1] Assignees

The assignee of a claim is the real party in interest with respect to the enforcement of that claim, and he alone may sue to enforce it.<sup>26</sup> The assignee of a claim is a necessary party to any suit on that claim, even though he may hold it for security purposes only.<sup>27</sup> The assignor may sue if he joins the assignee.<sup>28</sup> If the assignor conditions the assignment on the consent of a third party, the conditional

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<sup>24</sup> *Vaughn v. Dame Constr. Co.*, 223 Cal. App. 3d 144, 148, 272 Cal. Rptr. 261, 263 (1990) (a transfer of real property does not automatically carry with the owner's causes of action relating to that property). A person may sue or be sued in any name in which he or she is known and recognized. *Cabrera v. McMullen*, 204 Cal. App. 3d 1, 4, 251 Cal. Rptr. 34, 35 (1988). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:1–:4 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 103–107 (4th ed. 1997).

<sup>25</sup> *Tinsley v. Palo Alto Unified Sch. Dist.*, 91 Cal. App. 3d 871, 883, 154 Cal. Rptr. 591, 598 (1979).

<sup>26</sup> *Reios v. Mardis*, 18 Cal. App. 276, 280, 122 P. 1091, 1093 (1912). If the assignee agrees that the assignor should sue, an objection that the assignor is not the real party in interest will not provides grounds for reversal because the defendant is fully protected from future action. *Greco v. Oregon Mut. Fire Ins. Co.*, 191 Cal. App. 2d 674, 687, 12 Cal. Rptr. 802, 809–10 (1961). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:16–:27 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 108–112 (4th ed. 1997).

<sup>27</sup> *Greco v. Oregon Mut. Fire Ins. Co.*, 191 Cal. App. 2d 674, 687, 12 Cal. Rptr. 802, 809 (1961).

<sup>28</sup> *Greco v. Oregon Mut. Fire Ins. Co.*, 191 Cal. App. 2d 674, 687, 12 Cal. Rptr. 802, 809 (1961).

assignee has standing to enforce the claim and to challenge the refusal of the third party to consent to the assignment.<sup>29</sup>

**Example:** The owner of a franchise in *D Corp.* assigns the franchise to *P*, subject to the consent of *D Corp.* Unfortunately for *P*, however, *D Corp.* refuses to consent, and *P* sues *D Corp.*, which objects that *P* is not the real party in interest because, in the absence of *D Corp.*'s consent, the assignment to *P* was ineffective. The court rules that *P* is not the real party in interest.

The court erred. The court's ruling would leave *P* with no means to challenge *D Corp.*'s right to withhold its consent.<sup>30</sup>

If the owner of a claim assigns part of the claim to another, the assignee cannot enforce the claim by himself because to do so would split the cause of action and subject the debtor to the possibility of a multiplicity of actions on a single obligation.<sup>31</sup> To enforce the partially assigned claim, the assignor or assignee must join as a plaintiff or defendant any other person holding an interest in the claim.<sup>32</sup>

The transfer of an interest in an action or proceeding does not terminate the action. The transferee may continue the action in the transferor's name or substitute himself for the transferor.<sup>33</sup>

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<sup>29</sup> *Don Rose Oil Co. v. Lindsley*, 160 Cal. App. 3d 752, 759, 206 Cal. Rptr. 670, 673–74 (1984).

<sup>30</sup> *Don Rose Oil Co. v. Lindsley*, 160 Cal. App. 3d 752, 759, 206 Cal. Rptr. 670, 673–74 (1984).

<sup>31</sup> *Purcell v. Colonial Ins. Co.*, 20 Cal. App. 3d 807, 814, 97 Cal. Rptr. 874, 878 (1971).

<sup>32</sup> *Cain v. State Farm Mut. Auto. Ins. Co.*, 47 Cal. App. 3d 783, 795, 121 Cal. Rptr. 200, 207 (1975).

<sup>33</sup> CODE CIV. PROC. § 368.5; *Luster v. Collins*, 15 Cal. App. 4th 1338, 1345, 19 Cal. Rptr. 2d 215, 219 (1993).

### [2] Subrogees

If a party pays the debt of another under some legal obligation and not as a volunteer, that party is subrogated to the claim against the debtor and steps into the creditor's shoes for purposes of enforcing the claim. The doctrine of subrogation works an assignment of the subrogor's claim to the subrogee, and the rules regarding suits by assignors and assignees apply with equal force to suits by subrogors and subrogees. If a subrogee compensates the subrogor, the subrogee can allow the subrogee to pursue a judgment for his loss in his own name and then enforce his subrogation interest. Or, the subrogee may join as co-plaintiff in the action against the tortfeasor.<sup>34</sup> If the subrogee only partially compensates the subrogor, then either may sue the debtor to enforce the claim but must join the other in order to avoid splitting the cause of action.<sup>35</sup>

### [3] Estates

Estates are not legal entities and cannot be parties to litigation.<sup>36</sup> Cases involving estates must be brought or defended in the name of the personal representative: the real party in interest with respect to an action involving the interests of an estate is

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<sup>34</sup> McMahan's v. City of Santa Monica, 146 Cal. App. 3d 683, 691, 194 Cal. Rptr. 582, 587 (1983). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:28–:31 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 113–114 (4th ed. 1997).

<sup>35</sup> Bank of the Orient v. Superior Court, 67 Cal. App. 3d 588, 595, 136 Cal. Rptr. 741, 745 (1977).

<sup>36</sup> Lazar v. Estate of Lazar, 208 Cal. App. 2d 554, 25 Cal. Rptr. 354 (1962). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:6–:13, :126–:130 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 115–117 (4th ed. 1997).

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the personal representative of the estate.<sup>37</sup> If the heirs or devisees wish to pursue a cause of action formerly belonging to the decedent, they must commence probate proceedings and arrange for the appointment of a personal representative to file suit.

The plaintiff in an action pending against the decedent when he died may continue the action against the decedent's personal representative if:

➔ Claims Against Decedents' Estates

- (1) he files a claim against the estate pursuant to the probate claims procedure;
- (2) the personal representative rejects the claim, in whole or in part; and
- (3) within three months after the notice of rejection is given, the plaintiff applies to the court in which the action is pending for an order to substitute the personal representative in the action.<sup>38</sup>

The plaintiff may not obtain any recovery against the property in the decedent's estate unless he proves that he met these three requirements.<sup>39</sup>

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<sup>37</sup> CODE CIV. PROC. § 369(a)(1);

. A plaintiff having a claim against a decedent may, however, sue the decedent's estate "to establish the decedent's liability for which the decedent was protected by insurance" without joining the decedent's personal representative or heirs. PROB. CODE § 550(a). The plaintiff need not go through the normal probate claims rigmarole, but if he does not submit a claim, he may not recover damages exceeding the limits of the applicable insurance. PROB. CODE § 9390(a), (b).

➔ Claims Against Decedents' Estates

<sup>38</sup> PROB. CODE § 9370(a). The three month limitation applies only if the notice of rejection contains a statement that the plaintiff has three months within which to apply for an order for substitution. *Id.*

<sup>39</sup> PROB. CODE § 9370(b).

### § 1.03 Limitations on the Joinder of Parties

➔ [Form: Declaration by  
Successor in Interest](#)

➔ [Claims Against  
Decedents' Estates](#)

A cause of action that survives its owner's death passes first to the personal representative and then to the decedent's successor in interest; the personal representative may commence an action on the claim, or, if the estate assets either have been distributed or have passed to the successor in interest without administration, the successor in interest may sue.<sup>40</sup> The plaintiff, however, must file an affidavit or declaration establishing his right to sue.<sup>41</sup>

Subject to the procedure for claims against estates, the owner of a surviving cause of action against a decedent may assert the claim against the personal representative of the decedent's estate or, if the decedent's property passed to the successor in interest without administration, against the successor in interest.<sup>42</sup>

Beneficiaries may not prosecute actions for the recovery of property belonging to the estate; it is the duty of the personal representative to do so. A beneficiary, however, may prosecute such a claim if the personal representative cannot or will not act or if the personal representative himself, by collusion or otherwise, obstructs the transmission of the estate to the heirs.<sup>43</sup>

Beneficiaries may not prosecute actions for the recovery of property belonging to the estate; it is the duty of the personal representative to do so. A beneficiary, however, may prosecute such a claim if the personal representative cannot or will not act or if the personal representative himself, by collusion with the debtor or otherwise, obstructs the transmission of the estate to the heirs.<sup>44</sup>

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<sup>40</sup> CODE CIV. PROC. § 377.30.

<sup>41</sup> CODE CIV. PROC. § 377.32.

<sup>42</sup> CODE CIV. PROC. § 377.40.

<sup>43</sup> *Landis v. First Nat'l Bank*, 20 Cal. App. 2d 198, 207, 66 P.2d 730, 734 (1937).

**Example:** *P*, a devisee of decedent *X*, sues *D*, the executor of *X*'s estate, and *Y Bank*, of which *D* is president, accusing them of having wrongfully sold, at a private sale without notice, stock that *X* had pledged to *Y Bank*. *P* did not, however, allege that he had demanded that *D* sue *Y Bank*.

*P* had standing to sue *D* and *Y Bank* in his own name.<sup>45</sup>

Probate Code section 9654 provides an exception to the general rule making the personal representative the real party in interest in cases involving the estate. The heirs or devisees may themselves, or jointly with the personal representative, maintain an action for possession of property or to quiet title to property against any person except the personal representative. A claim to impose a constructive trust is, in effect, an action for "possession of property."<sup>46</sup> In order to invoke section 9654, the plaintiff must allege a legal interest in the property in question—either that the decedent devised the property to the plaintiff in his will or that the decedent did not dispose of the property by will and that the plaintiff is the decedent's heir at law.<sup>47</sup>

#### [4] Trusts

Cases involving trusts must be brought (or defended) in the name of the trustee: the trustee of an express trust is the real party in interest in litigation respecting the trust, not the beneficiaries of the trust.<sup>48</sup> The beneficiaries, however, are the real

<sup>44</sup> *Olson v. Toy*, 46 Cal. App. 4th 818, 824, 54 Cal. Rptr. 2d 29, 33 (1996); *Landis v. First Nat'l Bank*, 20 Cal. App. 2d 198, 207, 66 P.2d 730, 734 (1937).

<sup>45</sup> *Landis v. First Nat'l Bank*, 20 Cal. App. 2d 198, 207, 66 P.2d 730, 734 (1937).

<sup>46</sup> *Olson v. Toy*, 46 Cal. App. 4th 818, 823, 54 Cal. Rptr. 2d 29, 32 (1996).

<sup>47</sup> *Bohn v. Smith*, 252 Cal. App. 2d 678, 681–82, 60 Cal. Rptr. 757, 760 (1967).

parties in interest in controversies among themselves or between themselves and the trustee.<sup>49</sup> If the trustee wrongfully transfers trust property to a third party, the beneficiaries are also real parties in interest in litigation against the third party.<sup>50</sup>

A trustee upon whom a deed of trust or mortgage confers a power of sale may sue for judicial foreclosure.<sup>51</sup> Unlike other trust beneficiaries, however, the beneficiary named in a deed of trust has the right to bring suit to foreclose,<sup>52</sup> even without any involvement of the trustee.<sup>53</sup>

The attorney general is a real party in interest to enforce the terms of a charitable trust,<sup>54</sup> as are the trustees<sup>55</sup> and members of the public for whom the trust was

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<sup>48</sup> CODE CIV. PROC. § 369(a)(2); *Powers v. Ashton*, 45 Cal. App. 3d 783, 787, 119 Cal. Rptr. 729, 732 (1975). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:6–:13 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 118–120, 138 (4th ed. 1997).

<sup>49</sup> *De Olazabel v. Mix*, 24 Cal. App. 2d 258, 261, 74 P.2d 787, 789 (1937) (dispute between beneficiary and trustee).

<sup>50</sup> *Triplett v. Williams*, 269 Cal. App. 2d 135, 138, 74 Cal. Rptr. 594, 596 (1969).

<sup>51</sup> CODE CIV. PROC. § 369(b).

<sup>52</sup> CODE CIV. PROC. § 725a.

<sup>53</sup> *Monterey S.P. Partnership v. W.L. Bangham, Inc.*, 49 Cal. 3d 454, 460, 777 P.2d 623, 626, 261 Cal. Rptr. 587, 590 (1989). In an action by another lienholder to challenge the existence or priority of the beneficiary's lien, the other lienholder must join the beneficiary as a defendant; a judgment against the trustee alone is not binding on the beneficiary. *Id.* at 461, 777 P.2d at 627, 261 Cal. Rptr. at 591.

<sup>54</sup> GOV. CODE § 12591.

<sup>55</sup> *Holt v. College of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 754, 394 P.2d 932, 935, 40 Cal. Rptr. 244, 247 (1964).

created.<sup>56</sup> Similar rules apply to actions to challenge the actions of nonprofit corporations.<sup>57</sup>

### [5] Corporations

A corporation is the real party in interest with respect to claims based on wrongs committed against the corporation. The shareholders lack standing to sue on such claims in their own names.<sup>58</sup> If, however, the officers and directors refuse to enforce a claim of the corporation, the shareholders may bring a derivative action to enforce the claim on the corporation's behalf.<sup>59</sup>

When a director of a corporation engages in misconduct causing injury to the corporation's financial condition, to the detriment of creditors of the corporation, the claim against the director belongs to the corporation or its trustee in bankruptcy. When, however, a third party conspires with a director to defraud creditors by stripping the corporation of its assets, the creditors may sue the third party directly, without waiting for the trustee to take action.<sup>60</sup>

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<sup>56</sup> San Diego County Council, *Boy Scouts of Am. v. City of Escondido*, 14 Cal. App. 3d 189, 196, 92 Cal. Rptr. 186, 190 (1971).

<sup>57</sup> CORP. CODE § 5142.

<sup>58</sup> *Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93, 107, 460 P.2d 464, 470, 81 Cal. Rptr. 592, 598 (1969). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:14–:15 (1996).

<sup>59</sup> *Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93, 107, 460 P.2d 464, 470, 81 Cal. Rptr. 592, 598 (1969). The corporation, however, remains the real party in interest and must be joined as a defendant. *Id.*

<sup>60</sup> *Practice Serv. Corp. v. HCA Health Servs. Cal., Inc.*, 37 Cal. App. 4th 1003, 1007–08, 44 Cal. Rptr. 2d 104, 106–07 (1995).



**[6] Principals and Agents**

An agent, including the holder of a power of attorney, is not the real party in interest with respect to matters coming within the scope of his agency; only the principal has standing to sue.<sup>61</sup>

**[7] Parties to Contracts**

With the exception of intended third-party beneficiaries, only the parties to a contract may sue for its breach. If a party to a contract makes a promise to the other party for the intended benefit of a third party, the promisee and the third-party beneficiary are both real parties in interest in an action for breach of the promise.<sup>62</sup> As applied to insurance policies, these rules dictate that any person for whose benefit policy proceeds are payable may sue for breach of the policy,<sup>63</sup> but indirect beneficiaries of policies may not.<sup>64</sup> Either the company or the union may initiate arbitration proceedings under a collective bargaining agreement and may sue to

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<sup>61</sup> *Arnolds Management Corp. v. Eishen*, 158 Cal. App. 3d 575, 580–81, 205 Cal. Rptr. 15, 19 (1984). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 2:13 (1996).

<sup>62</sup> CIV. CODE § 1559; CODE CIV. PROC. § 369(a)(3). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:32–:39 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 123–124 (4th ed. 1997).

<sup>63</sup> *Hatchwell v. Blue Shield*, 198 Cal. App. 3d 1027, 1034, 244 Cal. Rptr. 249, 252–53 (1988).

<sup>64</sup> *Gantman v. United Pac. Ins. Co.*, 232 Cal. App. 3d 1560, 1566–67, 284 Cal. Rptr. 188, 191–92 (1991) (members of nonprofit corporation may not sue in their own names on a policy issued to the corporation). *Compare* *Truestone, Inc. v. Travelers Ins. Co.*, 55 Cal. App. 3d 165, 171, 127 Cal. Rptr. 386, 390 (1976) (shareholders may sue on a policy naming the corporation and the shareholders as insureds).

compel arbitration, enforce the award, or set it aside, but individual employees may not.<sup>65</sup>

The principal, not the agent, has standing to sue upon a contract the agent made on behalf of the principal. If, however, the agent made the contract without disclosing that he was acting in a representative capacity, the other party may sue either the undisclosed principal or the agent but not both.<sup>66</sup>

**[B] Exceptions to the Real Party in Interest Rule**

**[1] Actions by Parents for Personal Injuries to Their Children**

The parents of a legitimate, unmarried, minor child may bring a joint action against the tortfeasor for personal injuries to the child.<sup>67</sup> If either parent refuses to join in the action or cannot be found, the other parent may bring the action.<sup>68</sup> A parent of an illegitimate, unmarried, minor child may bring an action for personal injuries to the child unless a guardian has been appointed for the child, in which case the guardian may bring the action.<sup>69</sup>

► Parties Who Must Be Joined—Actions by Parents for Personal Injuries to Their Children

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<sup>65</sup> Melander v. Hughes Aircraft Co., 194 Cal. App. 3d 542, 546–47, 239 Cal. Rptr. 592, 595 (1987).

<sup>66</sup> Ikerd v. Warren T. Merrill & Sons, 9 Cal. App. 4th 1833, n.6, 12 Cal. Rptr. 2d 398, 401 n.6 (1992).

<sup>67</sup> CODE CIV. PROC. § 376(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 2:40.1 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 135–136 (4th ed. 1997).

<sup>68</sup> CODE CIV. PROC. § 376(a).

<sup>69</sup> CODE CIV. PROC. § 376(b), (e).

**[2] Actions by Public Officials to Protect Private Parties**

Sprinkled throughout the codes are statutes empowering various public officials to bring actions to protect the interests of various private parties:

- The labor commissioner may bring actions to recover wages owed to employees unable to afford private counsel.<sup>70</sup>
- A county may sue to compel payment of child support.<sup>71</sup>
- A district attorney may bring an action to determine the parentage of a child.<sup>72</sup>
- The attorney general may bring actions to protect the rights of corporate shareholders.<sup>73</sup>
- The director of benefit payments may bring actions against tortfeasors and uninsured motorist carriers to recover compensation for Medi-Cal benefits paid to accident victims.<sup>74</sup>

**[3] Taxpayer Suits**

A taxpayer may file an action seeking an injunction against any illegal public expenditure or waste of public property,<sup>75</sup> even if the taxpayer has no personal

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<sup>70</sup> Lab. Code § 98.3(a). *See generally* 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 137 (4th ed. 1997).

<sup>71</sup> WELF. & INST. CODE § 11350.1; *County of Tulare v. Boggs*, 146 Cal. App. 3d 236, 243, 194 Cal. Rptr. 80, 84 (1983). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:71--72 (1996).

<sup>72</sup> FAM. CODE § 7634.

<sup>73</sup> CORP. CODE § 1508.

<sup>74</sup> WELF. & INST. CODE § 14124.71.

interest in the litigation.<sup>76</sup> The taxpayer's action lies against state agencies and officials as well as local governments and officials.<sup>77</sup>

#### [4] Mandamus Proceedings

Although one must normally demonstrate that one is “beneficially interested” in governmental proceedings in order to have standing to initiate mandamus proceedings to challenge governmental action,<sup>78</sup> an ordinary citizen's interest in the enforcement of the law suffices to support standing in mandamus proceedings to compel enforcement of a public duty protecting a public right.<sup>79</sup>

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<sup>75</sup> CODE CIV. PROC. § 526a. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 2:70 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 144–146 (4th ed. 1997).

<sup>76</sup> Blair v. Pitchess, 5 Cal. 3d 258, 269–70, 486 P.2d 1242, 1250, 96 Cal. Rptr. 42, 50 (1971). The right to sue extends to resident and nonresident taxpayers alike. Irwin v. City of Manhattan Beach, 65 Cal. 2d 13, 19, 415 P.2d 769, 772–73, 51 Cal. Rptr. 881, 884–85 (1966) (CORP. CODE § 526a's limitation in favor of resident taxpayers held unconstitutional). *But see* City of Los Angeles v. Superior Court, 50 Cal. App. 4th 598, 610 n.12, 57 Cal. Rptr. 2d 878, 885 n.12 (1996) (nonresident lacks standing unless he alleges that he pays taxes on local real property).

<sup>77</sup> CODE CIV. PROC. § 526a; Los Altos Property Owners Ass'n v. Hutcheon, 69 Cal. App. 3d 22, 29–30, 137 Cal. Rptr. 775, 779 (1977).

<sup>78</sup> CODE CIV. PROC. § 1086; Kappadah v. Alcan Pac. Co., 222 Cal. App. 2d 626, 643, 35 Cal. Rptr. 354, 365 (1963) (requiring proof of the plaintiff's “private or particular interest . . . to be preserved or protected, independent of that which he holds with the public at large”), *disapproved on other grounds*, Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 517 n.16, 522 P.2d 12, 18 n.16, 113 Cal. Rptr. 836, 842 n.16 (1974).

[5] Wrongful Death Cases

Any of the following persons may bring an action for wrongful death:

- the decedent's surviving spouse and children
- if there is no surviving issue of the decedent, the persons, including the surviving spouse, who would be entitled to the property of the decedent by intestate succession<sup>80</sup>
- the decedent's putative spouse, children of the putative spouse, stepchildren, or parents, if they were dependent on the decedent<sup>81</sup>
- a minor, if at the time of the decedent's death, the minor had resided for the previous 180 days in the decedent's household and was dependent on the decedent for one half or more of his support.<sup>82</sup>

Although one would normally regard the above individuals as the real parties in interest in a wrongful death case, the Code of Civil Procedure also allows the personal representative of the decedent's estate to bring an action for wrongful death on their behalf.<sup>83</sup>

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<sup>79</sup> Green v. Obledo, 29 Cal. 3d 126, 144, 624 P.2d 256, 266, 172 Cal. Rptr. 206, 216 (1981). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:66-:69 (1996).

<sup>80</sup> CODE CIV. PROC. § 377.60(a). The father of an illegitimate child may sue for wrongful death if he acknowledged the child and contributed to his support. Lozano v. Scalier, 51 Cal. App. 4th 843, 846, 59 Cal. Rptr. 2d 346, 348 (1996). See generally 4 B.E. WITKIN, CALIFORNIA PROCEDURE, Pleading § 126 (4th ed. 1997).

<sup>81</sup> CODE CIV. PROC. § 377.60(b).

<sup>82</sup> CODE CIV. PROC. § 377.60(c).

**[6] Bankrupts**

Once a person files for protection under the bankruptcy statutes, the property of the bankrupt as of the time of filing becomes the property of a bankruptcy estate, as does property he acquires during the next 180 days and property the estate acquires.<sup>84</sup> The bankrupt's claims are included in the bankruptcy estate, and the right of the bankrupt to sue on causes of action as to which he was the real party in interest passes from him to the trustee of the bankruptcy estate.<sup>85</sup> The bankrupt lacks standing to sue unless the trustee abandons the cause of action.<sup>86</sup> When rights derive from property claimed as exempt, the claim arose after the bankruptcy petition was filed, and the bankruptcy court determines the property to be exempt, the debtor has standing to litigate causes of action with regard to that property.<sup>87</sup> There is a split of authority on whether the bankrupt may continue to prosecute in his own name an action commenced before his bankruptcy.<sup>88</sup>

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<sup>83</sup> CODE CIV. PROC. § 377.60.

<sup>84</sup> 11 U.S.C. § 541(a)(1), (a)(5).

<sup>85</sup> 11 U.S.C. § 323(b); *Bostanian v. Liberty Sav. Bank*, 52 Cal. App. 4th 1075, 1080–81, 61 Cal. Rptr. 2d 68, 71 (1997). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:7–:8 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 127–128 (4th ed. 1997).

<sup>86</sup> *Reichert v. General Ins. Co.*, 68 Cal. 2d 822, 829–30, 442 P.2d 377, 380–81, 69 Cal. Rptr. 321, 324–25 (1968); *Bostanian v. Liberty Sav. Bank*, 52 Cal. App. 4th 1075, 1081, 61 Cal. Rptr. 2d 68, 72 (1997).

<sup>87</sup> *Amstone v. Peninsular Fire Ins. Co.*, 226 Cal. App. 3d 1019, 1024, 277 Cal. Rptr. 260, 263 (1991).

<sup>88</sup> *Compare* *ABA Recovery Servs., Inc. v. Konold*, 198 Cal. App. 3d 720, 726, 244 Cal. Rptr. 27, 31 (1988) (allowing continued prosecution), *with* *Bostanian v. Liberty Sav. Bank*, 52 Cal. App. 4th 1075, 1082–83, 61 Cal. Rptr. 2d 68, 72–73 (1997) (rejecting continued prosecution).

The conversion of a bankruptcy proceeding from Chapter 11 to 7 does not effect any change in the composition of the property of the estate. Property of the Chapter 7 estate is determined as of the date the Chapter 11 petition was filed.<sup>89</sup>

**[7] Receivers**

In any of a variety of situations in which a person may be unwilling or unable to preserve his property, the superior court may appoint a receiver to take charge of the asset in question.<sup>90</sup> If the asset is a cause of action, the receiver alone may sue on that cause of action, and then only with court permission.<sup>91</sup>

**[8] Unincorporated Associations**

Case authority supports the proposition that an ascertainable class of individuals having a community of interest as victims in seeing that applicable law are enforced may form an association through which they may bring an action to redress their common harm.<sup>92</sup> The association does not have standing to vindicate the members' personal interests (*i.e.*, recover damages for personal injury or emotional distress).<sup>93</sup>

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<sup>89</sup> *Bostanian v. Liberty Sav. Bank*, 52 Cal. App. 4th 1075, 1084, 61 Cal. Rptr. 2d 68, 74 (1997).

<sup>90</sup> CODE CIV. PROC. § 564. *See generally* 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 129 (4th ed. 1997).

<sup>91</sup> CODE CIV. PROC. § 568. Parties suing the receiver likewise need court permission to sue. *Ostrowski v. Miller*, 226 Cal. App. 2d 79, 84, 37 Cal. Rptr. 790, 792 (1964). Court permission is not a jurisdictional requirement; if the receiver fails to object, he forfeits his objection. *Vitug v. Griffin*, 214 Cal. App. 3d 488, 493, 262 Cal. Rptr. 588, 591 (1989).

<sup>92</sup> *Tenants Ass'n of Park Santa Anita v. Southers*, 222 Cal. App. 3d 1293, 1304, 272 Cal. Rptr. 361, 367 (1990). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:41--:58.1 (1996).

### § 1.03 Limitations on the Joinder of Parties

Contrary authority, however, holds that an association which has not itself been injured has standing to sue on behalf of its members only if it acts as a class representative in a class action suit.<sup>94</sup>

An association established to manage a “common interest development” (*i.e.*, condominium) may institute litigation in its own name and without joining the individual owners in matters pertaining to the enforcement of the governing documents, damage to the common areas, damage to separate interests that the association is obligated to maintain, and damage to separate interests which is integrally related to damage to the common areas or to separate interests that the association is obligated to maintain.<sup>95</sup>

A labor union may represent its members in an action that is inseparably founded upon its members’ employment. Furthermore, a union can bring a representative action even if, at the time of the action, the affected employee is not a member or the union is no longer the exclusive representative.<sup>96</sup>

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<sup>93</sup> *Tenants Ass’n of Park Santa Anita v. Southers*, 222 Cal. App. 3d 1293, 1304, 272 Cal. Rptr. 361, 368 (1990). The association may perhaps circumvent this limitation by taking an assignment of the members’ individual claims. *Cf. County of San Luis Obispo v. Abalone Alliance*, 178 Cal. App. 3d 848, 863–64, 223 Cal. Rptr. 846, 854 (1986). Otherwise, the members must join individually as plaintiffs.

<sup>94</sup> *National Solar Equip. Owners’ Ass’n, Inc. v. Grumman Corp.*, 235 Cal. App. 3d 1273, 1280, 1 Cal. Rptr. 2d 325, 329 (1991).

<sup>95</sup> CIV. CODE § 1363(c); CODE CIV. PROC. § 383(a). Section 383(a) applies to associations formed after the damage has occurred. *Orange Grove Terrace Owners Ass’n v. Bryant Properties, Inc.*, 176 Cal. App. 3d 1217, 1222–23, 222 Cal. Rptr. 523, 526 (1986). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:59–:62.



**[9] Unfair Business Practice Cases**

Anyone may sue on behalf of the public to enjoin unfair business practices or false advertising under California’s unfair competition statutes<sup>97</sup> and, as ancillary relief, may obtain restitution for victims of the defendant’s wrongful acts.<sup>98</sup>

**[10] Other Cases**

An employer who expends funds on behalf of an injured employee may assert a cause of action in its own right against the tortfeasor responsible for the employee’s injury.<sup>99</sup> A parent, guardian, conservator, or other person having charge of an underage person may initiate proceedings to nullify the child’s marriage at any time before the married minor has arrived at the age of legal consent.<sup>100</sup> Parents may maintain an action for personal injury caused to their unemancipated child.<sup>101</sup> A person to whom a negotiable instrument has been negotiated may sue upon the

→ Emancipation of Children

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<sup>96</sup> Anaheim Elementary Educ. Ass’n v. Board of Education, 179 Cal. App. 3d 1153, 1157, 225 Cal. Rptr. 468, 471 (1986).

<sup>97</sup> BUS. & PROF. CODE §§ 17204, 17535. See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:65–:65.2 (1996).

<sup>98</sup> People v. Superior Court (Jayhill Corp.), 9 Cal. 3d 283, 286, 507 P.2d 1400, 1402, 107 Cal. Rptr. 192, 194 (1973).

<sup>99</sup> Lab. Code § 3852. See generally 4 B.E. WITKIN, CALIFORNIA PROCEDURE, Pleading §§ 130–133 (4th ed. 1997).

<sup>100</sup> FAM. CODE § 2211(a)(2).

<sup>101</sup> CODE CIV. PROC. § 376.

instrument.<sup>102</sup> If a penalty statute so provides, a private party may bring an action against a wrongdoer to recover a penalty on behalf of the state.<sup>103</sup>

**[C] Capacity to Sue and Be Sued**

In certain cases, the question remains, once the potential plaintiffs and defendants have been identified, whether the parties have the capacity to sue and be sued. A competent, adult human being has the capacity to sue and be sued. Other entities must have legally recognized personalities in order to enjoy legal capacity. These include corporations, unincorporated associations, and governmental entities.

In general, the same party cannot appear both as a plaintiff and as a defendant in the same case. You cannot sue yourself.<sup>104</sup>

One must take care to distinguish between lack of capacity to sue and lack of standing to sue. Incapacity is a legal disability that deprives a party of the right to represent his own interests in court. Standing to sue goes to the existence of a cause of action in favor of the plaintiff.<sup>105</sup> The defendant may forfeit an objection to the plaintiff's lack of capacity if fails to assert it properly.

➡ Special Demurrers:  
Plaintiff's Lack of  
Capacity to Sue

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<sup>102</sup> COM. CODE § 3301.

<sup>103</sup> *Sanders v. Pacific Gas & Elec. Co.*, 53 Cal. App. 3d 661, 671, 126 Cal. Rptr. 415, 421 (1975). *See generally* 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 139 (4th ed. 1997).

<sup>104</sup> *Mayo v. White*, 178 Cal. App. 3d 1083, 1093, 224 Cal. Rptr. 373, 379 (1986). *See generally* 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 58–59 (4th ed. 1997).

<sup>105</sup> *American Alternative Energy Partners II, 1985 v. Windridge, Inc.*, 42 Cal. App. 4th 551, 559, 49 Cal. Rptr. 2d 686, 690–91 (1996).

[1] Children and Incompetents

A minor may enforce his rights by means of civil litigation in the same manner as an adult<sup>106</sup> and is civilly liable for his wrongs.<sup>107</sup> When, however, a minor (or an incompetent person or a person for whom a conservator has been appointed) is a party, he must appear by a guardian or conservator of his estate or by a guardian ad litem appointed by the court.<sup>108</sup> The court may appoint a guardian ad litem for a minor or incompetent whenever the court deems expedient, even though the ward already has a guardian or conservator or has appeared by the guardian or conservator. An emancipated child—a person under the age of 18 who has entered

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<sup>106</sup> FAM. CODE § 6601.

<sup>107</sup> FAM. CODE § 6600. A child, however, is not subject to liability for punitive damages unless the child was capable of knowing that his act was wrongful. *Id.*

<sup>108</sup> CODE CIV. PROC. § 372. *See also* CODE CIV. PROC. § 373.5 (guardian ad litem for unborn or unascertained persons); CODE CIV. PROC. § 762.080 (guardian ad litem in quiet title actions); FAM. CODE § 2332 (guardian ad litem for insane respondent in dissolution proceedings); PROB. CODE § 1003 (guardian ad litem in probate proceedings); PROB. CODE § 3140(b) (guardian ad litem in proceeding to authorize a transaction involving an incompetent spouse). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:83–:88.1 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 60–62, 71–73, 136 (4th ed. 1997).

If a potential plaintiff was, at the moment his cause of action accrued, a minor (or insane or imprisoned for a term less than life), the applicable statute of limitations is tolled for the time of his disability. CODE CIV. PROC. § 352(a). This tolling provision, however, does not suspend the running of the time to submit a claim to a governmental entity, as a prerequisite to suit against that entity. *Id.* § 352(b). Nor does it toll the running of the one-year period allowed for filing an administrative complaint, GOV. CODE § 12960, under the California Fair Employment and Housing Act, *id.* §§ 12900 *et seq.* *Balloon v. Superior Court*, 39 Cal. App. 4th 1116, 1121, 46 Cal. Rptr. 2d 161, 164 (1995).

➡ Tort Claims Act—  
Tolling of the One-Year  
Period

into a valid marriage, who is on active duty with the armed forces, or who has received a declaration of emancipation<sup>109</sup>—has the capacity to sue or be sued in his own name.<sup>110</sup>

**Example:** *P* files a lawsuit and then goes insane. *G* is appointed his guardian. *G* has himself substituted as the plaintiff and files an amended complaint captioned, “*G*, as guardian of *P*, an insane person, v. *D*.” *G* obtains a judgment against *D*.

The judgment must be reversed. By his appointment as guardian, *G* did not become owner of *P*’s rights, and the amended complaint did not state a cause of action in favor of *G*. The amended complaint should have been captioned, “*P*, an insane person, by *G*, his guardian, v. *D*.”<sup>111</sup>

If a judgment is rendered without the appointment of a guardian ad litem, the child has the right to disaffirm the judgment once he becomes an adult. The minor’s right to disaffirm continues until barred by laches after he has attained the age of majority.<sup>112</sup> The child, however, may forfeit his right to disaffirm the judgment if:

- he elects to affirm the judgment upon reaching majority;<sup>113</sup>
- he takes any action in reference to the judgment after he comes of age that is

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<sup>109</sup> FAM. CODE § 7122.

<sup>110</sup> FAM. CODE § 7050(e)(4).

<sup>111</sup> Dixon v. Gries, 106 Cal. 506, 507, 39 P. 857, 857 (1895).

<sup>112</sup> Gouanillou v. Industrial Accident Comm’n, 184 Cal. 418, 420, 193 P. 937, 938 (1920).

<sup>113</sup> Johnston v. Southern Pac. Co., 150 Cal. 535, 540, 89 P. 348, 350 (1907).

consistent only with assuming the judgment’s validity;<sup>114</sup> or

- due to the minor’s advanced age and legal representation he suffered no prejudice.<sup>115</sup>

**[a] Procedure for Appointment of a Guardian ad Litem**

- ➔ Form: Application for Appointment of Guardian ad Litem
- ➔ Issuance of Summons

If a plaintiff is a minor, his attorney must obtain appointment of a guardian ad litem before the summons is issued. If the child is 14 years old, the child applies in his own name; if the child is less than 14 years old, a relative or friend of the child must make the application.<sup>116</sup> The better practice is to seek appointment of the guardian ad litem before filing the complaint, so that the plaintiff may allege the appointment in the complaint and thereby head off a demurrer on the ground that the plaintiff does not have the legal capacity to sue.<sup>117</sup> If a defendant is a minor, he may apply for the appointment of a guardian ad litem if the minor is 14 years old and makes his application within 10 days after service of the summons; otherwise, a relative or friend of the minor, any other party to the action, or the court, on its own motion, may make the application.<sup>118</sup>

- ➔ Demurrers—Plaintiff’s Lack of Capacity to Sue

- ➔ Service of the Summons and Complaint

The rules applicable to the appointment of a general guardian—the requirements of an oath, a bond, and letters of guardianship—do not apply to a guardian ad litem; the court simply signs an order of appointment or records the appointment in the

<sup>114</sup> Childs v. Lanterman, 103 Cal. 387, 391, 37 P. 382, 393 (1894).

<sup>115</sup> Carver v. Donin, 139 Cal. App. 395, 397, 33 P.2d 841, 842 (1934).

<sup>116</sup> CODE CIV. PROC. § 373(a). See generally 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 63–66 (4th ed. 1997).

<sup>117</sup> CODE CIV. PROC. § 430.010(b).

<sup>118</sup> CODE CIV. PROC. § 373(b).

court's minutes.<sup>119</sup> The Code of Civil Procedure specifies no qualifications or priority for the guardian ad litem: the matter is left to the trial court's discretion.<sup>120</sup> A guardian ad litem, however, may be removed for a conflict of interest or improper motives.<sup>121</sup>

**[b] Authority of a Guardian ad Litem**

A guardian ad litem exercises authority only with respect to the litigation affecting the ward, and that authority is limited. A guardian ad litem cannot retain an attorney for the child and make a contract on behalf of the child for the payment of attorneys' fees unless the contract receives the approval of the court in which the litigation is pending or of the court having jurisdiction of the child's guardianship estate.<sup>122</sup> A guardian ad litem has the power, subject to the court's approval, to settle the case, to agree to the order or judgment to be entered for or against the ward, and to satisfy any judgment in favor of the ward or release any claim of the ward pursuant to a compromise.<sup>123</sup> A guardian ad litem who is not a member of the bar may not appear pro per on behalf of the minor.<sup>124</sup>

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<sup>119</sup> *Foley v. Northern Cal. Power Co.*, 165 Cal. 103, 107, 130 P. 1183, 1185 (1913).

<sup>120</sup> *D.G. v. Superior Court*, 100 Cal. App. 3d 535, 546, 161 Cal. Rptr. 117, 124 (1979).

<sup>121</sup> *Estate of Emery*, 199 Cal. App. 2d 22, 29, 18 Cal. Rptr. 86, 91 (1962).

<sup>122</sup> FAM. CODE § 6602. *See generally* 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 67–69 (4th ed. 1997).

<sup>123</sup> CODE CIV. PROC. § 372; *cf. id.* § 373.5 (guardian ad litem for unborn or unascertained persons has the authority, subject to court approval, to settle a claim on behalf of his wards); PROB. CODE § 3500(a) (when a minor has a disputed claim and does not have a guardian of the estate, the parents have the authority to settle the claim on the child's behalf). See [{Procedure to obtain court approval of settlement of child's claim}](#). 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 70}.

**[2] Disabled Persons**

Code of Civil Procedure section 375 provides, “An action or proceeding does not abate by the disability of a party. The court, on motion, shall allow the action or proceeding to be continued by or against the party’s representative.”<sup>125</sup> Query: Is a judgment binding against a person who became disabled before or during an action if the court did not appoint a representative?

**[3] Corporations**

A corporation has all the powers of a natural person in carrying out his business activities, including the capacity to sue and be sued,<sup>126</sup> except that a corporation may not appear in court in *proprio persona* (*i.e.*, without an attorney) except in **small claims court**.<sup>127</sup> In order to conduct intrastate business, a foreign corporation must qualify to do business in California by registering with the secretary of state.<sup>128</sup> If it

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<sup>124</sup> J.W. v. Superior Court, 17 Cal. App. 4th 958, 968, 22 Cal. Rptr. 527, 532 (1993).

<sup>125</sup> See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:88.5–8 (1996).

<sup>126</sup> CORP. CODE § 207. The State Bar of California can sue and be sued in its capacity as a public corporation. BUS. & PROF. CODE § 6001. See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:89–:121 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 75–80 (4th ed. 1997); 5 *id.* § 1060.

<sup>127</sup> Merco Constr. Eng’rs, Inc. v. Municipal Court, 21 Cal. 3d 724, 730, 581 P.2d 636, 639, 147 Cal. Rptr. 631, 634 (1978). Non-attorney corporate representatives may appeal a small claims court judgment to superior court, CODE CIV. PROC. § 116.770(c), and may file notices of appeal from administrative rulings, Rogers v. Sonoma County Municipal Court, 197 Cal. App. 3d 1314, 1318–19, 243 Cal. Rptr. 530, 532 (1988).

<sup>128</sup> CORP. CODE § 2105.

### § 1.03 Limitations on the Joinder of Parties

fails to do so, it may not maintain an action in a California court upon intrastate business until it complies with the qualification requirements.<sup>129</sup> A foreign corporation may defend itself without registering with the secretary of state.<sup>130</sup> If, however, the Franchise Tax Board determines that the foreign corporation is doing business in California and has not paid its California taxes, the corporation also lacks the legal capacity to defend itself in litigation in California courts.<sup>131</sup> An assignee of a foreign corporation is barred from suing if the corporation would be barred for failure to comply with the requirements for doing business in the state.<sup>132</sup>

A domestic corporation loses its capacity to sue, or even to defend itself, if it fails to pay its corporate franchise taxes.<sup>133</sup> The same is true of a foreign corporation that has lost its legal capacity for nonpayment of taxes in its home state.<sup>134</sup> The plaintiff may thus prosecute his case to judgment without opposition from the defendant.

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<sup>129</sup> CORP. CODE § 2203(c). A party that has made a contract with a foreign corporation that has not qualified to do business in California may rescind the contract. REV. & TAX CODE § 23304.

<sup>130</sup> *United Medical Management Ltd. v. Gatto*, 49 Cal. App. 4th 1732, 1739, 57 Cal. Rptr. 2d 600, 603 (1996).

<sup>131</sup> REV. & TAX CODE §§ 23301, 23302; *United Medical Management Ltd. v. Gatto*, 49 Cal. App. 4th 1732, 1741, 57 Cal. Rptr. 2d 600, 605 (1996); *Mediterranean Exports, Inc. v. Superior Court*, 119 Cal. App. 3d 605, 614–15, 174 Cal. Rptr. 169, 175 (1981).

<sup>132</sup> *Thorner v. Selective Cam Transmission Co.*, 180 Cal. App. 2d 89, 93, 4 Cal. Rptr. 409, 412 (1960).

<sup>133</sup> REV. & TAX CODE §§ 23301, 23302. A party that has made a contract with a suspended corporation may judicially rescind the contract, *id.* §§ 23304.1, 23304.5, 23305a, even after the suspended corporation has cured the deficiency and restored its legal capacity, *Damato v. Slevin*, 214 Cal. App. 3d 668, 674–75, 262 Cal. Rptr. 879, 883 (1989).

<sup>134</sup> *CM Record Corp. v. MCA Records, Inc.*, 168 Cal. App. 3d 965, 968, 214 Cal. Rptr. 409, 411 (1985).



The corporation may, however, restore its legal capacity by curing the deficiency<sup>135</sup> and may obtain a continuance for that purpose.<sup>136</sup> Restoration of a corporation's legal capacity is without prejudice to any action, defense, or right that has accrued by reason of the original suspension.<sup>137</sup> The statute of limitations continues to run, despite the corporation's having filed suit.<sup>138</sup> The revival of corporate powers has the effect of validating acts occurring before judgment becomes final and permitting the corporation to proceed with the action.<sup>139</sup> This is true even if the corporation delays payment until after it has received indications of a favorable outcome to the lawsuit.<sup>140</sup>

**Example:** *P* files suit to quiet title to Blackacre, and *D Corp.* answers. At trial, *P* proves that *D Corp.*'s corporate powers were suspended long before. Without seeking a continuance, *D Corp.* informs the court that it is taking the steps necessary to restore its corporate powers. Without ruling on the issue of *D Corp.*'s capacity to defend, the court proceeds to try the case and takes the case under submission. *D Corp.* moves the court for leave to file an amended answer alleging the issuance of

<sup>135</sup> *Diverco Constructors, Inc. v. Wilstein*, 4 Cal. App. 3d 6, 12, 85 Cal. Rptr. 851, 855 (1970).

<sup>136</sup> *Schwartz v. Magyar House, Inc.*, 168 Cal. App. 2d 182, 188–189, 335 P.2d 487, 491 (1959).

<sup>137</sup> REV. & TAX CODE § 23305a; *cf.* *Electronic Equip. Express, Inc. v. Donald H. Seiler & Co.*, 217 Cal. App. 3d 834, 843, 176 Cal. Rptr. 239, 244 (1981) (statute of limitations defense not prejudiced by revival of corporation).

<sup>138</sup> *Sade Shoe Co. v. Oschin & Snyder*, 217 Cal. App. 3d 1509, 1513, 266 Cal. Rptr. 619, 622 (1990).

<sup>139</sup> *Peacock Hill Ass'n v. Peacock Lagoon Constr. Co.*, 8 Cal. 3d 369, 373, 503 P.2d 285, 287, 105 Cal. Rptr. 29, 31 (1972).

<sup>140</sup> *La France Enters. v. Van Der Linden*, 70 Cal. App. 3d 375, 380, 138 Cal. Rptr. 690, 692 (1977).

a certificate of revivor. The trial court grants judgment to *P* based on *D Corp.*'s lack of capacity and denies *D Corp.*'s motion to amend.

The judgment should be reversed. The court should have continued the trial until *D Corp.* completed the process of reviving its corporate powers and should then have decided the case on the merits.<sup>141</sup>

Suspension of corporate powers is a matter of abatement, not jurisdiction, and the opponent forfeits his objection unless he raises the issue in a timely manner.<sup>142</sup>

Following its dissolution, a corporation remains in existence indefinitely for the purpose of prosecuting and defending actions by or against it, and pending actions are not abated because of the dissolution.<sup>143</sup> In suits against dissolved corporations, the plaintiff may

- name the corporation as the defendant and execute his judgment upon the corporation's remaining assets and insurance, or
- sue the shareholders who have received corporate assets, in their name or in the name of the dissolved corporation.<sup>144</sup>

A different rule applies to a corporation that merges into another corporation: in a pending action against a merging corporation, the plaintiff may either:

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<sup>141</sup> *Duncan v. Sunset Agricultural Minerals*, 273 Cal. App. 2d 489, 493, 78 Cal. Rptr. 339, 342 (1969).

<sup>142</sup> *Traub Co. v. Coffee Break Serv., Inc.*, 66 Cal. 2d 368, 371, 425 P.2d 790, 792, 57 Cal. Rptr. 846, 848 (1967); *Color-Vue, Inc. v. Abrams*, 44 Cal. App. 4th 1599, 52 Cal. Rptr.2d 443 (1996).

<sup>143</sup> CORP. CODE § 2010(a), (b); *cf. id.* § 2011(c) (same rule applies in quiet title actions). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:74–;76, :118–:121 (1996).

<sup>144</sup> CORP. CODE § 2011(a)(1).

- proceed against the originally named defendant and obtain a judgment, which he may then execute against the surviving corporation, or
- substitute the surviving corporation in place of the original corporate defendant.<sup>145</sup>

The no longer existent corporation cannot, however, initiate an action.

**Example:** *P<sub>1</sub> Corp.* merges with *P<sub>2</sub> Corp.*, and *P<sub>1</sub> Corp.* is the surviving corporation. *P<sub>2</sub> Corp.* files an action against *D*. During trial the court allows *P<sub>2</sub> Corp.* to amend the caption to read “*P<sub>1</sub> Corp.*, doing business as *P<sub>2</sub> Corp.*” *D* moves to discharge the attachment of its property. The trial court denies the motion.

The trial court erred. *P<sub>2</sub> Corp.* lost the legal capacity to sue *D* once *P<sub>2</sub> Corp.* merged into *P<sub>1</sub> Corp.* A pending action can be maintained by either corporation, but an action not yet begun cannot be initiated in the name of the dead corporation.<sup>146</sup>

#### [4] Unincorporated Associations

An unincorporated association, including a partnership, whether organized for profit or not, may sue and be sued in the name it has assumed or by which it is known.<sup>147</sup> An unincorporated association doing business under a fictitious name must file a fictitious business name statement with the clerk of the county in which the association has its principal place of business. It may commence but may not maintain a suit on a contract entered into under its fictitious name until it complies

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<sup>145</sup> CORP. CODE § 1107(c).

<sup>146</sup> J.C. Peacock, Inc. v. Hasko, 184 Cal. App. 2d 142, 150–51, 7 Cal. Rptr. 490, 495 (1960).

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with this requirement.<sup>148</sup> A noncomplying association can cure its incapacity by filing its statement before judgment becomes final.<sup>149</sup> A limited partnership that fails to comply with the applicable filing requirements is a general partnership until it complies and has the capacity to sue as a limited partnership.<sup>150</sup> Once a defendant's true name is ascertained, all further proceedings should be in the defendant's true name.<sup>151</sup>

➔ Corporations

Like a foreign corporation, a foreign limited partnership must register with the secretary of state before engaging in intrastate business.<sup>152</sup> Until it does so, the partnership may not maintain any action in a California court.<sup>153</sup>

➔ Corporations

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<sup>147</sup> CODE CIV. PROC. § 369.5(a); *American Alternative Energy Partners II, 1985 v. Windridge, Inc.*, 42 Cal. App. 4th 551, 559, 49 Cal. Rptr. 2d 686, 691 (1996). Unincorporated associations share the incapacity of corporations to appear through someone other than an attorney. *Clear Air Transp. Sys. v. San Mateo County Transit Dist.*, 198 Cal. App. 3d 576, 579, 243 Cal. Rptr. 799, 800, *cert. denied*, 488 U.S. 862 (1988).

*See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:41–:58.1, :122–:125 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 81–85 (4th ed. 1997); 5 *id.* § 1061.

<sup>148</sup> BUS. & PROF. CODE § 17918; *American Alternative Energy Partners II, 1985 v. Windridge, Inc.*, 42 Cal. App. 4th 551, 562, 49 Cal. Rptr. 2d 686, 692 (1996). The fictitious business name statute does not affect the capacity of an association to be sued.

<sup>149</sup> *Kadota Fig Ass'n of Producers v. Case-Swayne Co.*, 73 Cal. App. 2d 796, 805, 167 P.2d 518, 523 (1946).

<sup>150</sup> *American Alternative Energy Partners II, 1985 v. Windridge, Inc.*, 42 Cal. App. 4th 551, 561, 49 Cal. Rptr. 2d 686, 692 (1996).

<sup>151</sup> *Pinkerton's, Inc. v. Superior Court*, 49 Cal. App. 4th 1342, 1349, 57 Cal. Rptr. 2d 356, 361 (1996).

<sup>152</sup> CORP. CODE § 15692.

One may join a member of an unincorporated association as a defendant in an action against the association.<sup>154</sup> Unless the association is separately designated as a defendant, a judgment against the members of the association is not binding on the association.

**Example:** *P* files an action against *D*<sub>1</sub> and *D*<sub>2</sub> as “partners doing business under the fictitious business name of *D Co.*”

*P*’s judgment against *D*<sub>1</sub> and *D*<sub>2</sub> is not binding on *D Co.* because the complaint did not name *D Co.* as a defendant.<sup>155</sup>

In general, a judgment in a case involving an unincorporated association is binding only on the members of the association who controlled the action, individually or in cooperation with others, and who had a proprietary or financial interest in the judgment or in the determination of a question of fact or law with reference to the same subject matter or transaction.<sup>156</sup> When the legislature has given statutory authority to sue to a public entity, a judgment rendered in an action involving that public entity is *res judicata* as to all members of the class represented. Therefore, citizens and residents, to the extent they are in privity with or represented by the city or state, are bound by judgments against the governmental body.<sup>157</sup>

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<sup>153</sup> CORP. CODE § 15697(a).

<sup>154</sup> CODE CIV. PROC. § 369.5(b).

<sup>155</sup> *Hildebrand v. Stonecrest Corp.*, 174 Cal. App. 2d 158, 169, 344 P.2d 378, 386 (1959).

<sup>156</sup> CODE CIV. PROC. § 1908(b).

<sup>157</sup> *Rynsbarger v. Dairymen’s Fertilizer Coop., Inc.*, 266 Cal. App. 2d 269, 277–78, 72 Cal. Rptr. 102, 107 (1968).

**[a] Owners of Separate Interests in Common Interest Developments**

One may not assert a tort cause action against the owner of a separate interest in a common interest development (*i.e.*, condominium) arising solely by reason of an ownership interest as a tenant in common in the development's common area if the development's owners' association has liability insurance covering the claim of at least \$2 million if the development consists of 100 or fewer separate interests or of at least \$3 if the development consists of more than 100 separate interests. If the association has the required coverage, one may sue only the association.<sup>158</sup> Strictly speaking, the statutory immunity of separate interest owners and the substitute liability of associations is not a matter of the owners' lack of capacity to be sued. Rather, it is part of the substantive law concerning the liability of landowners. Therefore, one would raise the separate interest owner's immunity by [general demurrer](#).

**[5] Building Contractors**

Before rendering services, a building contractor or subcontractor must obtain a contractor's license. No contractor may bring an action for the collection of compensation for the performance of any act or contract for which a license is required without alleging that he was a duly licensed contractor at all times during the performance of that act or contract, regardless of the merits of his cause of action.<sup>159</sup> The ban on actions by unlicensed contractors extends to all actions, however characterized, that effectively seek compensation for illegal unlicensed contract work. Thus, an unlicensed contractor cannot recover either for the agreed

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<sup>158</sup> CIV. CODE § 1365.9.

contract price or for the reasonable value of labor and materials.<sup>160</sup> “Compensation” includes both monetary and non-monetary contract rights.<sup>161</sup>

A contractor is:

[A]ny person, who undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith, or the cleaning of grounds or structures in connection therewith, and whether or not the performance of work herein described involves the addition to or fabrication into any structure, project, development or improvement herein described of any material or article of merchandise. The term contractor includes subcontractor and specialty contractor.<sup>162</sup>

Acting “by or through others” to improve property for purposes of the Contractors’ License Law entails directing or supervising the work performed. The purpose of the licensing law is to protect the public from incompetence and dishonesty in those

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<sup>159</sup> BUS. & PROF. CODE § 7031(a). The same rule applies to unlicensed subcontractors suing general contractors. *Hydrotech Sys., Ltd. v. Oasis Waterpark*, 52 Cal. 3d 988, 997, 803 P.2d 370, 375, 277 Cal. Rptr. 517, 522 (1991). The contractor’s incapacity does not extend to actions seeking compensation for services rendered outside California. *Conderback, Inc. v. Standard Oil Co.*, 239 Cal. App. 2d 664, 678, 48 Cal. Rptr. 901, 911 (1966). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL §§ 2:131–:134 (1996).

<sup>160</sup> *Hydrotech Sys., Ltd. v. Oasis Waterpark*, 52 Cal. 3d 988, 997, 803 P.2d 370, 376, 277 Cal. Rptr. 517, 523 (1991).

<sup>161</sup> *K & K Servs., Inc. v. City of Irwindale*, 47 Cal. App. 4th 818, 824, 54 Cal. Rptr. 2d 836, 838 (1996) (fill rights).

<sup>162</sup> BUS. & PROF. CODE § 7026.

who provide building and construction services. The licensing requirements provide minimal assurance that all persons offering such services have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. To effect this purpose, the law need apply only to those who actually perform, or supervise the performance of, construction services. It need not apply to those who only supply materials to be used by others or laborers who will be supervised by others. Thus, a person or company in the business of supplying equipment or hiring out laborers to be supervised by others is not deemed to act in the capacity of a contractor and is not required to have a license.<sup>163</sup>

Where the unlicensed contractor is also party to a separate contract, the unlicensed status will not bar him from obtaining relief for breach of the separate contract.<sup>164</sup> An unlicensed contractor may assert a setoff based on a contract for building services, notwithstanding that the contract is otherwise unenforceable due to the absence of a license.<sup>165</sup>

The judicial doctrine of substantial compliance does not apply when the person who engaged in the business or acted in the capacity of a contractor has never been a licensed contractor. However, the court may determine that the contractor substantially complied with licensing requirements if it is shown that the contractor

<sup>163</sup> Contractors Labor Pool, Inc. v. Westway Contractors, Inc., 53 Cal. App. 4th 152, ??, 61 Cal. Rptr. 2d 715, 724 (1997).

<sup>164</sup> McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, 69, 315 P.2d 322, 336 (1957); Ranchwood Communities Ltd. Partnership v. Jim Beat Const. Co., 49 Cal. App. 4th 1397, 1411, 57 Cal. Rptr. 2d 386, 393 (1996).

<sup>165</sup> Ranchwood Communities Ltd. Partnership v. Jim Beat Const. Co., 49 Cal. App. 4th 1397, 1411, 57 Cal. Rptr. 2d 386, 393 (1996).



(1) had been duly licensed as a contractor in this state before performing the act or contract, (2) acted reasonably and in good faith to maintain his license, and (3) did not know or reasonably should not have known that he was not duly licensed.<sup>166</sup> The hirer of an unlicensed contractor who opines to the contractor that the work in question does not require a license is not estopped from objecting to the lack of a license, for unlicensed contractors are held to knowledge of the requirements of the licensing law.<sup>167</sup>

There is no exception to the licensing requirement for contractors who contract with public entities.<sup>168</sup>

#### [6] States and Their Subdivisions

The state of California and its subdivisions have the legal capacity to sue and be sued.<sup>169</sup> The party-related problems that arise in connection with lawsuits by governmental agencies are (1) does a particular statute authorize the state to bring the action,<sup>170</sup> and (2) which division of state government is the proper party to bring the action.<sup>171</sup>

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<sup>166</sup> BUS. & PROF. CODE § 7031(d); G.E. Hetrick & Assocs., Inc. v. Summit Constr. & Maintenance Co., 11 Cal. App. 4th 318, 328, 13 Cal. Rptr. 2d 803, 808–09 (1992).

<sup>167</sup> K & K Servs., Inc. v. City of Irwindale, 47 Cal. App. 4th 818, 827, 54 Cal. Rptr. 2d 836, 840 (1996).

<sup>168</sup> K & K Servs., Inc. v. City of Irwindale, 47 Cal. App. 4th 818, 825, 54 Cal. Rptr. 2d 836, 839 (1996) (fill rights).

<sup>169</sup> GOV. CODE § 945. *See generally* 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 91–94 (4th ed. 1997).

<sup>170</sup> *See, e.g.*, People v. Centr-O-Mart, 34 Cal. 2d 702, 704, 214 P.2d 378, 379 (1950).

➡ Claims Against  
Governmental Entities  
and Employees

At common law, the doctrine of sovereign immunity stood in the way of actions against public entities. The legislature has largely abrogated the doctrine. Sister states are not immune from suit in California for harm caused by their activities in California.<sup>172</sup> Another state is subject to the personal jurisdiction of the California courts if its agents engage in activities establishing the requisite **minimum contacts** with California.<sup>173</sup>

### [7] Sister State Representatives

Guardians, conservators, and estate representatives appointed in sister states do not have the legal capacity to sue in California in their representative capacities.<sup>174</sup> In order to file suit, the representative must first institute ancillary proceedings in California.<sup>175</sup> A sister state personal representative is subject to suit in California in a representative capacity to the same extent that the nondomiciliary decedent was subject to California jurisdiction at the time of his death.<sup>176</sup>

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<sup>171</sup> *See, e.g.*, *People v. Superior Court*, 10 Cal. 2d 288, 295, 73 P.2d 1221, 1225 (1937) (the agency to which has been delegated the authority to institute a condemnation action has the exclusive power to do so).

<sup>172</sup> *Hall v. University of Nev.*, 8 Cal. 3d 522, 526, 503 P.2d 1363, 1366, 105 Cal. Rptr. 355, 358 (1972), *cert. denied*, 414 U.S. 820 (1973).

<sup>173</sup> *Hall v. University of Nev.*, 8 Cal. 3d 522, 526, 503 P.2d 1363, 1366, 105 Cal. Rptr. 355, 358 (1972).

<sup>174</sup> CODE CIV. PROC. § 1913(b). *See generally* 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 99 (4th ed. 1997).

<sup>175</sup> *See, e.g.*, PROB. CODE §§ 12500–12542 (ancillary administration of probate estate).

<sup>176</sup> PROB. CODE § 12591.

**[8] The United States and its Agencies and Officials**

The United States is a juristic person in the sense that it has capacity to sue upon contracts made with it or in vindication of its property rights.<sup>177</sup> Congress has passed numerous statutes waiving the sovereign immunity of the United States and its agencies and officials in a wide variety of cases.<sup>178</sup> The federal courts have exclusive jurisdiction of these cases.<sup>179</sup>

**[9] Foreign Nations and Their Officials**

Foreign nations have the legal capacity to sue in American courts, provided that the United States has recognized the foreign government<sup>180</sup> and is not at war with the foreign nation.<sup>181</sup> By filing suit, however, a foreign nation submits to the court's jurisdiction and forfeits the sovereign immunity from the defendant's cross-claims that it would otherwise enjoy.<sup>182</sup>

Foreign nations are subject to jurisdiction in American courts only with respect to their commercial activities.<sup>183</sup> The federal courts have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign

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<sup>177</sup> United States v. Cooper Corp., 312 U.S. 600, 604 (1941).

<sup>178</sup> See 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 86–90 (4th ed. 1997).

<sup>179</sup> 28 U.S.C. § 1346(b).

<sup>180</sup> Guaranty Trust Co. v. United States, 304 U.S. 126, 136 (1938). See generally 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 95–97 (4th ed. 1997).

<sup>181</sup> Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 409 (1964) (severance of diplomatic relations does not deprive foreign government of capacity to sue).

<sup>182</sup> National City Bank v. Republic of China, 348 U.S. 356, 364 (1955).

<sup>183</sup> 28 U.S.C. §§ 1604, 1605.

state as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity.<sup>184</sup>

A diplomatic agent enjoys immunity from civil and administrative process, subject certain to exceptions. He does not enjoy immunity from actions relating to private immovable property when he is involved, in his private capacity, in an issue of succession to such property, or from actions relating to professional or commercial activity outside his official functions.<sup>185</sup> A consular officer is immune from civil process in respect of acts or omissions in the exercise of the officer's official functions.<sup>186</sup> The federal courts have exclusive jurisdiction of all civil actions and proceedings against consuls or vice consuls of foreign states or members of a mission or members of their families.<sup>187</sup>

### [10] Aliens

In general, an alien has the same capacity as any other individual to sue and be sued. An enemy of the United States, however, may not avail himself of the United States courts.<sup>188</sup> An enemy is defined as any individual, partnership, or other body of individuals, of any nationality, residing within the territory of any nation with which the United States is at war, or residing outside the United States and doing business within such territory, and any corporation incorporated within the territory of any nation with which the United States is at war or incorporated within any

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<sup>184</sup> 28 U.S.C. § 1330(a).

<sup>185</sup> Vienna Convention Diplomatic Relations art. 31.

<sup>186</sup> Vienna Convention on Consular Relations art. 43.

<sup>187</sup> 28 U.S.C. § 1351

<sup>188</sup> See generally 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 101 (4th ed. 1997).

country other than the United States and doing business within such territory.<sup>189</sup> The President may designate nationals of an enemy country, wherever they reside or do business, as enemies.<sup>190</sup> An enemy alien retains the right to defend an action brought against him.<sup>191</sup>

California law contains no provision barring access to the courts to aliens present in the United States illegally. Though Proposition 187 purported to deny illegal aliens access to public education and social services, it did not attempt to deny them access to the courts. It is doubtful that the requirement of due process would allow a defendant to injure an illegal alien with impunity and then avoid liability on the ground of the plaintiff's status.<sup>192</sup>

#### [11] Indian Tribes

California has jurisdiction over civil causes of action between Indians or to which Indians are parties, arising in "Indian country," and those civil laws that are of general application to private persons or private property have the same force and effect within Indian country as they have elsewhere within the state.<sup>193</sup> Indian tribes, however, are immune from suit.<sup>194</sup>

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<sup>189</sup> 50 U.S.C. App. § 2(a).

<sup>190</sup> 50 U.S.C. App. § 2(c).

<sup>191</sup> 50 U.S.C. App. § 7(b).

<sup>192</sup> *Cf. Arteaga v. Literski*, 83 Wis. 2d 128, 265 N.W.2d 148 (1978); *Janusis v. Long*, ?? Mass. ??, 188 N.E. 288 (1933). *See generally* Peter S. Muñoz, Note, *The Right of an Illegal Alien to Maintain a Civil Action*, 63 CALIF. L. REV. 762 (1975).

<sup>193</sup> 28 U.S.C. § 1360(a).

**[12] Prisoners**

Persons sentenced to state prison may be sued and have the right to initiate civil actions.<sup>195</sup>

**§ 1.04 Parties Who Must Be Joined**

Questions often arise in litigation whether the plaintiffs have included in their group all of the persons who should join as plaintiffs and whether the plaintiffs have named as defendants all the persons who should defend the lawsuit.

**[A] Necessary Parties**

A person who is subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction must be named as a party in either of two situations:

- (1) when, in his absence, the court cannot accord complete relief among those already parties; or
- (2) when he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may impair his ability to protect that interest or leave any of the existing parties subject to a substan-

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<sup>194</sup> Long v. Chemehuevi Indian Reservation, 115 Cal. App. 3d 853, 856–57, 171 Cal. Rptr. 733, 734–35, cert. denied, 454 U.S. 831 (1981). See generally 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 100 (4th ed. 1997).

<sup>195</sup> PENAL CODE § 2601(e). A prisoner has the right to be present during proceedings to terminate his parental rights or to declare his child a ward of the court. *Id.* § 2625. The court may order a prisoner’s presence in court in other actions affecting his parental or marital rights. *Id.* See generally 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 102 (4th ed. 1997).

tial risk of incurring double, multiple, or otherwise inconsistent obligations<sup>196</sup> by reason of the missing party's claimed interest.<sup>197</sup>

Under the traditional nomenclature, such a person is known as a *necessary party*. If the plaintiffs have not joined the missing person as a plaintiff or defendant, the court must order that the plaintiffs make him a party. A complaint or cross-complaint must identify any necessary parties who are not joined and state the reasons why not.<sup>198</sup>

### [B] Indispensable Parties

If a necessary party cannot be joined as a plaintiff or defendant, the court must decide whether the case can proceed in his absence. The Code of Civil Procedure lists four factors the court should consider:

- (1) the extent to which a judgment rendered in the person's absence might prejudice him or those already parties;<sup>199</sup>
- (2) the extent to which, by protective provisions in the judgment, by shaping of the relief granted, or other measure, the prejudice may be lessened or avoided;
- (3) whether a judgment rendered in the person's absence will be adequate;<sup>200</sup>

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<sup>196</sup> A "substantial risk" means more than a theoretical possibility of the absent party's asserting a claim that would result in multiple liability. The risk must be substantial as a practical matter. *Union Carbide Corp. v. Superior Court*, 36 Cal. 3d 15, 21, 679 P.2d 14, 17, 201 Cal. Rptr. 580, 583 (1984).

<sup>197</sup> CODE CIV. PROC. § 389(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:151–:159 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 163–164, 168 (4th ed. 1997).

All persons having an interest in a cause of action are necessary parties.

<sup>198</sup> CODE CIV. PROC. § 389(c).

- (4) whether the plaintiffs (or cross-complainants) will have an adequate remedy if the action is dismissed without prejudice for nonjoinder.<sup>201</sup>

A person in whose absence an action cannot go forward is known as an *indispensable party*.

Failure to join a party who may be regarded as “indispensable” is not a jurisdictional defect in the technical sense. When a case has been fully tried without objection to the absence of parties and the claim that the absent parties were indispensable is raised for the first time on appeal, the rule’s underlying policy considerations of avoiding piecemeal litigation and multiplicity of suits are of little consequence inasmuch as the judicial and litigant resources necessary to the

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<sup>199</sup> According to the Federal Rules Advisory Committee Note on Rule 19 of the Federal Rules of Civil Procedure, on which Code of Civil Procedure section 389 was based, this factor brings into consideration what a judgment in the action would mean to the absentee:

Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? The possible collateral consequences of the judgment upon the parties already joined are also to be appraised. Would any party be exposed to a fresh action by the absentee, and if so, how serious is the threat?

See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 2:160–:183 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 165–167, 169–170 (4th ed. 1997).

<sup>200</sup> According to the Federal Rules Advisory Committee Note, the third factor “calls attention to the extent of the relief that can be accorded among the parties joined. It meshes with the other factors, especially the ‘shaping the relief’ mentioned under the second factor.”

<sup>201</sup> CODE CIV. PROC. § 389(b). According to the Federal Rules Advisory Committee Note, the fourth factor “indicates that the court should consider whether there is an assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible.”



litigation have already been expended. The only justification for the rule permitting the issue to be raised for the first time on appeal is that the absence of a party has precluded the trial court from rendering any effective judgment between the parties before it.<sup>202</sup>

Indispensable parties include:

- all the claimants to a common fund, in an action by one of them for his share of the fund<sup>203</sup>
- the assignees of a lease, in the lessor's action to set aside the assignments as forgeries<sup>204</sup>
- all the partners in a partnership, in an action for dissolution of the partnership<sup>205</sup>
- a county that provides Aid to Families with Dependent Children benefits, in an action by the noncustodial parent to reduce his child support obligation<sup>206</sup>
- a city, in an action against the director of the city's department of finance to compel the issuance of a license to operate a video game center, where the director had no more authority than to advise the applicant that no license could be issued unless the city council ordered it<sup>207</sup>

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<sup>202</sup> *Kraus v. Willow Park Public Golf Course*, 73 Cal. App. 3d 354, 367–69, 140 Cal. Rptr. 744, 752–53 (1977).

<sup>203</sup> *Bank of Cal. Nat'l Ass'n v. Superior Court*, 16 Cal. 2d 516, 521, 106 P.2d 879, 883 (1940).

<sup>204</sup> *Atlantic Richfield Co. v. Superior Court*, 51 Cal. App. 3d 168, 175, 124 Cal. Rptr. 63, 67 (1975).

<sup>205</sup> *Kraus v. Willow Park Public Golf Course*, 73 Cal. App. 3d 354, 369, 140 Cal. Rptr. 744, 753 (1977).

<sup>206</sup> *Marriage of Lugo*, 170 Cal. App. 3d 427, 433, 217 Cal. Rptr. 74, 77 (1985).

## § 1.04 Parties Who Must Be Joined

- an applicant for services for a developmentally disabled person, in an action to set aside an administrative determination of entitlement<sup>208</sup>
- a property owner, in an action challenging a development that would include the owner's property<sup>209</sup>
- the Department of Finance, in a mandamus action challenging a decision of the Commission on State Mandates.<sup>210</sup>

The minority shareholders in a corporation are not indispensable parties in an action by the majority shareholder as the assignee of a note requiring payment to their corporation.<sup>211</sup> The owner of property for which a shopping center was planned was not an indispensable party in an action against the county and the developer to set aside the county's approval of amendments to the county's general plan and zoning reclassifications.<sup>212</sup>

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<sup>207</sup> Welch v. Bodeman, 176 Cal. App. 3d 833, 839–40, 222 Cal. Rptr. 435, 439 (1986).

<sup>208</sup> Inland Counties Regional Center v. Office of Admin. Hearings, 193 Cal. App. 3d 700, 705–06, 238 Cal. Rptr. 422, 424–25 (1987).

<sup>209</sup> Sierra Club v. California Coastal Comm'n, 95 Cal. App. 3d 495, 501, 157 Cal. Rptr. 190, 194 (1979) (owner could not be joined because of the running of the statute of limitations). *Accord*, Save Our Bay, Inc. v. San Diego Unified Port Dist., 42 Cal. App. 4th 686, 693, 49 Cal. Rptr. 2d 847, 853 (1996); Beresford Neighborhood Ass'n v. City of San Mateo, 207 Cal. App. 3d 1180, 1189, 255 Cal. Rptr. 434, 438 (1989).

<sup>210</sup> Redevelopment Agency v. Commission on State Mandates, 43 Cal. App. 4th 1188, 1197, 51 Cal. Rptr. 2d 100, 105 (1996).

<sup>211</sup> Niederer v. Ferreira, 189 Cal. App. 3d 1485, 1495, 234 Cal. Rptr. 779, 784 (1987).

<sup>212</sup> Citizens Ass'n for Sensible Dev. v. County of Inyo, 172 Cal. App. 3d 151, 162, 217 Cal. Rptr. 893, 899–900 (1985).

**[C] Statutes Requiring Joinder of Parties**

Various statutes creating private rights of action expressly require the joinder of certain parties, including:

- in an action by an innocent improver to remove fixtures, the owner of the land and encumbrancers of record<sup>213</sup>
- in a wrongful death action, all the statutory heirs<sup>214</sup>
- in a paternity suit, the child if he is 12 years old or older<sup>215</sup>
- in an action to modify or terminate a charitable trust, the attorney general<sup>216</sup>
- in an action against a sheriff for the wrongful act of a deputy or employee, the deputy or employee<sup>217</sup>
- in an action to determine the title to or the boundaries of tidelands or submerged lands, the state<sup>218</sup>
- in an action against a vehicle owner based on the negligence of someone using the vehicle with the owner's permission, the driver if he is subject to the service

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<sup>213</sup> CIV. CODE § 1013.5(b). *See generally* 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 174 (4th ed. 1997).

<sup>214</sup> CODE CIV. PROC. § 377.60; *Watkins v. Nutting*, 17 Cal. 2d 490, 498, 110 P.2d 384, 388 (1941).

<sup>215</sup> FAM. CODE § 7635. If the child is less than 12 years old, he may be joined as a party, but joinder is not mandatory. *Id.*

<sup>216</sup> GOV. CODE § 12591.

<sup>217</sup> GOV. CODE § 26685.

<sup>218</sup> PUB. RES. CODE § 6308; *Abbot Kinney Co. v. City of Los Angeles*, 53 Cal. 2d 52, 56, 346 P.2d 385, 387 (1959).

of process.<sup>219</sup>

**[D] Actions by Parents for Personal Injuries to Their Children**

➔ Exceptions to the Real Party in Interest Rules—Actions by Parents for Personal Injuries to Their Children

In actions by parents for personal injuries to their legitimate children, if either parent refuses to join in the action or cannot be found, the other parent must join the missing parent as a defendant.<sup>220</sup> If a parent of an illegitimate child brings an action for personal injuries to the child, the other parent may be joined as a party.<sup>221</sup> If the noncustodial parent brings the action, the custodial parent must be served with the summons and complaint.<sup>222</sup>

**[E] Spouses**

A married person may be sued without his or her spouse being joined as a party.<sup>223</sup> If spouses are sued together, each may defend of his or her own right, but if one spouse neglects to defend, the other spouse may defend for that spouse.<sup>224</sup>

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<sup>219</sup> VEH. CODE §§ 17152.

<sup>220</sup> CODE CIV. PROC. § 376(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 2:40.1 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 135–136 (4th ed. 1997).

<sup>221</sup> CODE CIV. PROC. § 376(d).

<sup>222</sup> CODE CIV. PROC. § 376(b).

<sup>223</sup> CODE CIV. PROC. § 370. *See generally* 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 74, 135 (4th ed. 1997).

<sup>224</sup> CODE CIV. PROC. § 371. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 2:73 (1996).

**§ 1.05 Joining an Unwilling Plaintiff**

If one party cannot obtain the cooperation of another party who should join the first party as a plaintiff in the action, the first party may sue the other as a defendant, providing that he alleges the reason for doing so.<sup>225</sup> A defendant joined in this manner is treated as a plaintiff.<sup>226</sup> Thus, one may join an unwilling plaintiff as a defendant, even though the expiration of the statute of limitations would normally prevent the plaintiff from amending his pleadings to add a defendant.<sup>227</sup> If an interested party is not the real party in interest and the real party in interest refuses to sue, the interested party may sue in his own name, joining the real party in interest as a defendant.<sup>228</sup>

**§ 1.06 Fictitious Defendants**

Code of Civil Procedure section 474 provides a means by which a plaintiff may preserve his right, despite the running of the statute of limitations, to join a defendant whose identity the plaintiff does not know.<sup>229</sup> If the plaintiff does not

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<sup>225</sup> CODE CIV. PROC. § 382. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 2:158 (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 190 (4th ed. 1997).

<sup>226</sup> *Watkins v. Nutting*, 17 Cal. 2d 490, 498, 110 P.2d 384, 388 (1941).

<sup>227</sup> *Worthington v. Kaiser Found. Health Plan, Inc.*, 8 Cal. App. 3d 435, 447, 87 Cal. Rptr. 272, 279 (1970).

<sup>228</sup> *Vanasek v. Pokorny*, 73 Cal. App. 312, 319, 238 P. 798, ??? (1925).

<sup>229</sup> *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:58.1–:64b (1996); 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 439–455 (4th ed. 1997).

know a defendant’s name, he must state that fact in the complaint. He may thereafter designate the defendant in any pleading by a fictitious name. Designating fictitious defendants does not toll the running of the statute of limitations; it merely provides the plaintiff the opportunity to amend the complaint at some future date to add a defendant’s true name to an already pleaded cause of action. An amended pleading will not relate back unless the original complaint set forth or attempted to set forth some cause of action against the fictitiously named defendant.<sup>230</sup>

**Example:** “Plaintiff does not know the true names of the persons sued in this Complaint under the fictitious names Defendants Doe One through Doe Ten, and when he learns these defendants’ true names, he will amend this Complaint accordingly. Defendants Doe One through Doe Ten committed the wrongful acts alleged in this Complaint.”

When the plaintiff learns the defendant’s true name, he must amend the complaint.<sup>231</sup> Because a complaint complying with section 474 notifies all parties of the plaintiff’s intention to amend, the plaintiff need not go through the formality of a noticed motion in order to make the required amendment.<sup>232</sup> If a delay in making the necessary amendment prejudices the new party’s defense of the case, then the trial court may deny leave to amend,<sup>233</sup> but the plaintiff’s discovery of the fictitious defendant’s name does not start the running of a second limitations period within

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<sup>230</sup> *Winding Creek v. McGlashan*, 44 Cal. App. 4th 933, 941, 52 Cal. Rptr. 2d 236, 240 (1996).

<sup>231</sup> CODE CIV. PROC. § 474. See [{Amending Pleadings}](#).

<sup>232</sup> *Simon v. City and County of San Francisco*, 79 Cal. App. 2d 590, 600, 180 P.2d 393, 399 (1947) (motion to amend made during trial without prior notice).

<sup>233</sup> *Barrows v. American Motors Corp.*, 144 Cal. App. 3d 1,8, 192 Cal. Rptr. 380, 383 (1983).

which the plaintiff must amend.<sup>234</sup> The plaintiff's power to invoke section 474 lapses once judgment in the case becomes final as to the defendants sued by their true names.<sup>235</sup>

**Example:** *P* settles with the defendants named by their true names and dismisses the fictitiously named defendants. After the trial court approves the settlement and dismisses the jury, *P* serves *D* with the complaint and summons, designating *D* as defendant Doe One. The trial court denies *D*'s motion to quash service of the summons.

The trial court exceeded its jurisdiction. Once the case was dismissed as to the defendants sued by their true names, the trial court lost jurisdiction to allow *P* to amend the complaint and revive the action against *D*.<sup>236</sup>

The plaintiff's failure to amend does not deprive the court of jurisdiction over a defendant served under a fictitious name; if he fails to object, he loses his objection to the omission.<sup>237</sup> Failure to amend provides grounds for a motion to vacate a default judgment against a fictitiously named defendant.<sup>238</sup>

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<sup>234</sup> *Sobeck & Assocs., Inc. v. B & R Invs. No. 24*, 215 Cal. App. 3d 861, 869, 264 Cal. Rptr. 156, 160 (1989).

<sup>235</sup> *Mason & Assocs., Inc. v. Guarantee Sav. & Loan Ass'n*, 269 Cal. App. 2d 132, 134, 74 Cal. Rptr. 669, 671 (1969).

<sup>236</sup> *McIntire v. Superior Court*, 52 Cal. App. 3d 717, 720–21, 125 Cal. Rptr. 379, 381–82 (1975).

<sup>237</sup> *Larson v. Barnett*, 101 Cal. App. 2d 282, 290, 225 P.2d 297, 302 (1950).

<sup>238</sup> *Flores v. Smith*, 47 Cal. App. 2d 253, 260, 117 P.2d 712, 716 (1941).

When [serving the summons and complaint](#) on a defendant designated by a fictitious name, the server checks the box on the summons which states,

**NOTICE TO THE PERSON SERVED:** You are served

...

2.  as the person sued under the fictitious name of (*specify*):

and fills in the fictitious name in the space provided. The certificate or affidavit of service must state (1) the fictitious name under which the defendant was served, and (2) the fact that notice of identity was given by endorsement upon the summons as required above.

**Example:** *P* sues 20 Does for slander and malicious interference. She alleges that Does One through Twenty are individuals whose names she will insert when she learns their true names. The complaint alleges wrongful acts against *D*, although it does not name *D* as a defendant. The judgment is reversed in appeal, and *P* files an amended complaint naming *D* as Doe One. *D* invokes the statute of limitations as a bar to *P*'s claim. *P* argues that the filing of her original complaint naming Doe One as a fictitious defendant tolled the running of the limitations period as to *D*. The trial court sustains *D*'s defense.

The trial court ruled correctly. *P* could not avail herself of Code of Civil Procedure section 474 because she failed to allege that she did not know *D*'s name. On the contrary, her original complaint showed that she did know *D*'s name and could have joined him as a defendant.<sup>239</sup>

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<sup>239</sup> Lipman v. Rice, 213 Cal. App. 2d 474, 478, 28 Cal. Rptr. 800, 803 (1963).



In order to invoke section 474, the plaintiff must make his allegations of ignorance in good faith.<sup>240</sup> Section 474 provides no relief when a plaintiff simply fails to name the right party as a defendant.<sup>241</sup> Nor may the plaintiff use section 474 to substitute a known but omitted tortfeasor for another defendant sued by his true name.<sup>242</sup> If, however, the plaintiff genuinely does not know a tortfeasor's name but names fictitious defendants without alleging his ignorance of their true names, he may amend the complaint to cure the omission.<sup>243</sup> Actual ignorance of the defendant's identity is enough—the fact that the plaintiff had the means to obtain knowledge is irrelevant.<sup>244</sup> A plaintiff may claim ignorance of an unidentified defendant's name, even if it turns out that the unidentified defendant was someone the plaintiff knew in another context.<sup>245</sup> Section 474 allows a plaintiff in good faith to delay suing particular persons as named defendants until he has knowledge of sufficient facts to cause a reasonable person to believe liability is probable. The distinction between a suspicion that some cause could exist and a factual basis to believe a cause exists is critical in the operation of section 474.<sup>246</sup>

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<sup>240</sup> Scherer v. Mark, 64 Cal. App. 3d 834, 841, 135 Cal. Rptr. 90, 94 (1976).

<sup>241</sup> Stephens v. Berry, 249 Cal. App. 2d 474, 479, 57 Cal. Rptr. 505, 508 (1967).

<sup>242</sup> Schroeter v. Lowers, 260 Cal. App. 2d 695, 700–01, 67 Cal. Rptr. 270, 274 (1968).

<sup>243</sup> Dieckmann v. Superior Court, 175 Cal. App. 3d 345, 354, 220 Cal. Rptr. 602, 608 (1985).

<sup>244</sup> General Motors Corp. v. Superior Court, 48 Cal. App. 4th 580, 594, 55 Cal. Rptr. 2d 871, 880 (1996); Grinnell Fire Protection Sys. Co. v. American Sav. & Loan Ass'n, 183 Cal. App. 3d 352, 359, 228 Cal. Rptr. 292, 296–97 (1986).

<sup>245</sup> General Motors Corp. v. Superior Court, 48 Cal. App. 4th 580, 594, 55 Cal. Rptr. 2d 871, 880 (1996).

<sup>246</sup> Dieckmann v. Superior Court, 175 Cal. App. 3d 345, 363, 220 Cal. Rptr. 602, 614 (1985).

**Example:** *P* sues *D*<sub>1</sub> for injuries *P* suffered in a car accident. *P* knows that he has a cause of action against the owner who lent the car to *D*<sub>1</sub>, but *P* does not know the owner's identity. In deposition, *P* learns that the car belonged to *D*<sub>1</sub>'s father, *D*<sub>2</sub>, whose identity *P* knew when he filed his original complaint. *P* serves *D*<sub>2</sub> as "Doe One" and amends his complaint to state *D*<sub>2</sub>'s true name. The trial court sustains *D*<sub>2</sub>'s objection to his substitution.

The trial court erred. Believing that the owner of the car existed but not knowing the owner's name, *P* was entitled to sue the owner by a fictitious name.<sup>247</sup>

The courts have extended this principal to allow the plaintiff effectively to toll the running of the statute of limitations as to causes of action of which the plaintiff is ignorant. In *Austin v. Massachusetts Bonding and Insurance Co.*<sup>248</sup> the court held that a plaintiff could amend his complaint to allege a different cause of action based on the same general set of facts at the same time that he amended the complaint to identify a defendant by his true name.<sup>249</sup> Said the court, "A defendant unaware of the suit against him by a fictitious name is in no worse position if, in addition to substituting his true name, the amendment makes other changes in the allegations on the basis of the same general set of facts."<sup>250</sup> The cases are divided on the issue whether

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<sup>247</sup> *Larson v. Barnett*, 101 Cal. App. 2d 282, 289–90, 225 P.2d 297, 302 (1950).

<sup>248</sup> 56 Cal. 2d 596, 364 P.2d 681, 15 Cal. Rptr. 817 (1961).

<sup>249</sup> 56 Cal. 2d at 602, 364 P.2d at 684, 15 Cal. Rptr. at 820. *But see* *Von Gibson v. Lynch*, 197 Cal. App. 3d 725, 730, 243 Cal. Rptr. 50, 53 (1988) (ignorance of a tortfeasor's liability insurance does not constitute ignorance of a cause of action).

## § 1.06 Fictitious Defendants

the plaintiff has any duty to investigate to discover his causes of action and the names of his tortfeasors.<sup>251</sup>

→ Claims Against  
Governmental Entities  
and Employees

The section 474 fictitious name procedure is available when a plaintiff submits a timely claim to a public entity, files suit within the Tort Claims Act limitations period, and later serves an employee of the public entity as a fictitious defendant.<sup>252</sup> This procedure, however, does not work when the plaintiff submits a timely claim to a public entity, files suit without naming the public entity as a defendant, and then attempts to serve the entity as a fictitious defendant.<sup>253</sup>

A defendant sued under a fictitious name who appears and answers the complaint waives any objection he might have made to the court's jurisdiction.<sup>254</sup> A stranger to the litigation, however, cannot designate himself as a fictitious defendant and use section 474 as a vehicle to intervene in the action.<sup>255</sup>

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<sup>250</sup> 56 Cal. 2d at 602, 364 P.2d at 684, 15 Cal. Rptr. at 820.

<sup>251</sup> Compare *Schroeter v. Lowers*, 260 Cal. App. 2d 695, 700, 67 Cal. Rptr. 270, 274 (1968), and *Wallis v. Southern Pac. Trans. Co.*, 61 Cal. App. 3d 782, 786, 132 Cal. Rptr. 631, 634 (1976) (recognizing in dicta a duty to investigate) with *Balon v. Drost*, 20 Cal. App. 4th 483, 488, 25 Cal. Rptr. 2d 12, 15 (1993) (declining to follow *Schroeter*); *Munoz v. Purdy*, 91 Cal. App. 3d 942, 947, 154 Cal. Rptr. 472, 475 (1979) (rejecting *Schroeter* and *Wallis* as dicta); *General Motors Corp. v. Superior Court*, 48 Cal. App. 4th 580, 55 Cal. Rptr. 2d 871 (1996).

<sup>252</sup> *Olden v. Hatchell*, 154 Cal. App. 3d 1032, 1037, 201 Cal. Rptr. 715, 719 (1984).

<sup>253</sup> *Chase v. State*, 67 Cal. App. 3d 808, 812, 136 Cal. Rptr. 833, 835 (1977).

<sup>254</sup> *Bayle-Lacoste & Co. v. Superior Court*, 46 Cal. App. 2d 636, 645, 116 P.2d 458, 463 (1941).

<sup>255</sup> *Mercantile Trust Co. v. Stockton Terminal & E.R.R.*, 44 Cal. App. 558, 561, 186 P. 1049, 1050 (1919).

## § 1.06 Fictitious Defendants

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➔ [Venue—County of Defendant's Residence](#)

The naming of fictitious defendants has no effect on venue determinations turning upon the defendants' residences. The plaintiff may amend the complaint to allege the true name of a fictitious defendant after the other defendants have filed a motion for change of venue and before the hearing of the motion, in which case the court must consider the new defendant's residence in connection with the determination of the motion to change venue.<sup>256</sup> Service of the summons and complaint without amendment of the complaint, however, does not suffice.<sup>257</sup>

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<sup>256</sup> Gutierrez v. Superior Court, 243 Cal. App. 2d 710, 721–22, 42 Cal. Rptr. 592, 600 (1966).

<sup>257</sup> Bachman v. Cathry, 113 Cal. 498, 502, 45 P. 814, 815 (1896).